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The Legacy of Allotment

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ARTICLES

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I. INTRODUCTION: TERRITORIAL SOVEREIGNTY

The first principle of federal Indian law is the sovereign status of the Indian tribes. Since the Cherokee cases, the Supreme Court has classified tribes as "domestic dependent nations,"[1] exercising sovereignty over their territories. While the precise nature of that sovereignty may be indeterminate and subject to historic revisionism, sovereign status has nonetheless been recognized throughout the course of dealings between the United States and the Indian tribes. Tribal sovereignty, whatever its precise contours, has been a cornerstone of federal Indian law since its inception.

Indian tribes, however, are not sovereign in the international sense; they are not nation-states.[2] One of the sovereign powers denied to tribes is the ability to enter into foreign relations, to deal directly with any nation-state other than the United States,[3] and tribes thus lack one of the defining characteristics of states at international law.[4] Moreover, Indian tribes do not possess absolute authority within their jurisdictions, but rather are subject to the overarching authority and jurisdiction of the federal government.[5] Nonetheless, within the constraints of that federal power, tribes exercise "domestic dependent" sovereignty within tribal territories.

Sovereignty is inextricably tied to territory. Governments may exist in exile during times of political upheaval and cultures may survive for

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1. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

2. *Id.* At international law, sovereignty is the defining characteristic of states, and only states are sovereign. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 15 (1990). For discussions of the Indian tribes' rights to self-determination under international law, however, see S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837 (1990); Robert A. Williams, Jr., *Encounters on the Frontier of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660.

3. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

4. Most tribes, however, do meet the remaining central qualifications: a defined territory, a population, and a government. *See* Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. I, 165 L.N.T.S. 19, 25 (noting that a state should possess "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States").

5. The classic work in the area is Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984). For additional criticisms of the legitimacy of federal authority in Indian country, see Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993); Steven P. McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217 (1993); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219. Despite its misbegotten origins, however, federal power over tribes is recognized and enforced by federal courts.

centuries dispersed across nations, but sovereignty demands a territory over which the governmental authority of the sovereign extends. Control over territory is the most essential element of sovereignty.[6] Sovereignty necessitates a government with legislative, executive, and judicial powers over all persons and property within the territory, exercised free of foreign interference.[7] Territory thus represents both the encompassing limits of a state's jurisdiction over its resident populations and the barriers to outside jurisdiction.

Indian tribes have territories.[8] For most tribes, the major territory is the reservation, but tribal territories are more accurately determined as the Indian country, encompassing not only the entirety of the reservations, but certain lands outside reservation boundaries.[9] The primary statutory definition of Indian country as all lands within the limits of Indian reservations demonstrates that "Indian country" encompasses not property, but territory. Indian country is determined not by ownership of the soil, but by the territorial bounds of the sovereign tribe. Without that territory, without territorial sovereignty, tribes are too easily reduced to little more than "private, voluntary organizations."[10]

Nonetheless, tribal territorial sovereignty has come under increasing and increasingly virulent attack. In the early nineteenth century, Chief Justice

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6. *See, e.g.*, INGRID D. DE LUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 4-5 (2d ed. 1987).

7. *Id.* at 21. "Foreign" interference, in the context of tribal territories, means interference by the states. The modern battleground over tribal territorial sovereignty involves attempts by the states to exercise governmental authority and control within Indian country. As already noted, this article will assume the fact, if not the legitimacy, of federal power in Indian country. *See supra* note 4 and accompanying text.

8. On the importance of territory, see generally Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246 (1989).

9. Indian country is defined at 18 U.S.C. § 1151 (1988) as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The meaning of "reservation" in § 1151(a) encompasses lands set aside under federal protection for tribal use, whether those lands are formally designated as reservations or not. So-called "informal" reservations—tribal trust lands not necessarily within the formal boundaries of a reservation—qualify as Indian country under § 1151(a). Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985, 1991, 1993 (1993).

10. *See* United States v. Mazurie, 419 U.S. 544, 557 (1975); *see generally* Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (arguing that the Supreme Court ignores territorial sovereignty and treats tribes as mere private associations in cases where tribes would benefit from the recognition of their sovereign status).

John Marshall proffered a vision of great "conceptual clarity."[11] In *Worcester v. Georgia*, he held that the State of Georgia had no authority to extend its laws into Cherokee country, even though Cherokee territory was encompassed within the boundaries of the state and even though Georgia was attempting to apply its laws to non-Indians entering the Cherokee country.[12] For Marshall, Cherokee country was under the sovereign control of the Cherokee Nation, subject only to the exercise of federal power.[13] The territorial sovereignty of the tribes was complete, and inviolate against attempted incursions by the states.

By the late twentieth century, however, the Supreme Court was dismissively referring to "platonic notions" of tribal sovereignty that ought not bind the Court to Marshall's vision.[14] By 1980, the Court was comfortable in positing that: "Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries."[15] Nonetheless, *Worcester* has never been overruled

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11. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

12. 31 U.S. (6 Pet.) at 561.

13. *Id.* Even Marshall, however, recognized situations in which state authority within the Indian territories would be permissible. But these were severely limited:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.

Id. But see Ball, *supra* note 5, at 23-34. Professor Ball argues that nothing in the Marshall cases effected legal incorporation of the tribes into the United States, but rather disclaimed incorporation, and consequently that the Marshall cases do not serve as a basis of federal divestiture of tribal sovereign rights.

14. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). In *McClanahan*, the Court noted "a trend away from" the *Worcester* ideal of tribal sovereignty as a bar to state authority and a trend toward federal preemption of state jurisdiction. *Id.* The Court then engaged in an analysis of the Navajo treaty, the Arizona Enabling Act, and other federal legislation, ultimately concluding that Arizona had no authority to impose its income taxes on a Navajo woman who lived on and earned her income within the Navajo reservation. *Id.* at 181.

15. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980) (quoting *Worcester*, 31 U.S. (6 Pet.) at 561). In *Bracker*, the Court most definitely departed from Marshall's view. The issue before the Court was whether the State of Arizona could impose certain state taxes on a non-Indian logging company for business activities which the company performed solely on the reservation under contract with the tribal timber company. Had the Court followed *Worcester*, the outcome would presumptively have been simple. Arizona was attempting to assert state authority over non-Indians within reservation borders. The situation was directly analogous to that in *Worcester*, where the State of Georgia required non-Indians to obtain state permits to enter Cherokee territory. Georgia could not assert that authority in Cherokee country because its laws did not apply within the territorial borders of the Indian country. If *Worcester* survived intact, then Arizona also could not impose its taxes even on the non-Indian contractor because it could not extend its laws within the territorial bounds of the reservation.

and the Court consistently notes that tribes possess sovereign rights over their territories.[16] Thus, even as it retreats from the plain meaning of *Worcester* and Marshall's declaration of tribal territorial sovereignty, the Court continues to recognize, at least to some extent, the strong territorial component of tribal governmental authority.

The importance of territory to tribal sovereignty is demonstrated by the fluctuations of federal Indian policy over the last century. When the government's attention has turned to the assimilation of Indians into the majoritarian society and the dissolution of the tribes, tribal territory is the focus of the attack. During the allotment era of the late nineteenth and early twentieth centuries, the assimilationist goal rested on the allotment of reservations in severalty and the sale of the remaining lands. During the termination era of the 1950s, the approach was even cruder: wholesale withdrawal of federal protection from tribal territories, forced sale of lands, and distribution of the proceeds.

The opposite is also true. When federal Indian policy has turned to the protection and promotion of tribal autonomy, territory is again a central feature. At the repudiation of the allotment era, Congress ended all further depredations on the tribal land base and provided mechanisms for the return of unsold lands and the acquisition of "new" additional lands. With the reversal of the termination policy came the restoration acts, generally providing the restored tribes with some land base. Today, the recognition of groups as federally-recognized tribes also carries with it the demand for territory.

Instead, the Court in *Bracker* applied its then relatively new preemption analysis, to which tribal sovereignty constituted merely a "backdrop." *See* 448 U.S. at 143. The Court analyzed the "tradition" of tribal sovereignty, federal support for and encouragement of tribal self-government, and the pervasive nature of federal timber management statutes and regulations. *Id.* at 143-48. Based on those factors, the Court concluded that the state taxes were preempted because they would interfere with the *federal* objectives and policies. *Id.* at 151. The bottom line was thus the same as it would have been under *Worcester*: the state taxes were barred. But instead of prohibiting the state action as a plain intrusion into the territory of the sovereign tribe, the Court introduced the idea of balancing, thus giving legitimacy to the interests on the "other" side of the balance: those of the state. By the late 1980s, in a case similar to *Bracker*, the balancing test tipped in favor of the state, a result that would have been unthinkable under the *Worcester* approach. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). Professor Frickey refers to *Cotton Petroleum* as "perhaps the Rehnquist Court's prime offender of the Marshall legacy." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 433-34 (1993).

16. In the regulatory context, the Court often states that tribes possess "attributes of sovereignty over both their members *and their territory*." *Mazurie*, 419 U.S. at 557 (emphasis added) (quoted with approval in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987)). More broadly, the Court has recently recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987). These formulations necessarily reaffirm tribal territorial sovereignty. Tribal authority is not limited to members, but extends throughout the territorial boundaries of the Indian country.

The greatest and most concerted attack on the territorial sovereignty of the tribes was the allotment policy of the 1880s to the 1930s. The allotment policy was overtly directed to the dissolution of the tribes and the extinguishment of tribal territories. But the allotment policy was also a failure: it did not transform the Indians into yeoman farmers, but it did wreak destruction within tribal communities. Recognizing the atrocity of allotment, Congress formally ended the practice in 1934 and repudiated its policy underpinnings.

That should have been the end of allotment. But its legacy lingers on, and in recent years has been revived by the Court in a series of cases that give present effect to the discredited policy of allotment and assimilation. In the process, the Court has chosen to diminish tribal territories and to restrict tribal sovereign control over the territory that remains. By deciding cases in accord with the assimilation policy, the Court has undercut the sovereignty and territorial integrity of the Indian nations.

This article traces the legacy of allotment in the Court's recent opinions and argues that the decisions giving effect to the allotment policy are contrary to interpretive rules, precedent, and federal policy. Part II describes the allotment policy in effect from the late 1880s until 1934, briefly tracing its origins, its land programs, and its termination by Congress. Part II concludes with a brief look at current federal Indian policy and the modern legislative and executive focus on the governmental status of tribes. Part III explores the opinion that showcases the problem: *County of Yakima v. Yakima Indian Nation*,[17] the Court's recent interpretation of the General Allotment Act itself. The next two parts look at the Court's use of the legacy of allotment in cases that do not directly interpret the allotment act. Part IV discusses the reservation disestablishment cases, in which the Court often has invoked the legacy of allotment to deprive tribes of lands set aside as tribal territories, thus also robbing tribes of their sovereignty over the lost territory. Part V explores cases in which the Court has left the territorial boundaries intact, but used the legacy of allotment to dispossess tribes of full sovereign authority over that territory.

Part VI then reprises the question that former Commissioner of Indian Affairs, George Manypenny, asked at the very outset of the allotment era: "Shall we persist in a policy that has failed?" Shall we, in other words, continue to give effect to the policy of allotment, recognized as a failure and a disaster for the tribes, officially repudiated by the Congress, and contrary to every manifestation of current Indian policy? Unfortunately, the answer from the Supreme Court appears to be yes. It not only persists in giving

17. 504 U.S. 251 (1992).

effect to a policy that has failed, but does so in ways that disrespect the branch of government charged with authority over Indian affairs and mock the Court's own precedents in the field.

II. DISMANTLING THE LAND BASE, 1885-1934

The modern legacy of allotment, the late twentieth century attack on tribal sovereignty, has its origins in the late nineteenth century federal policy toward the Indian nations. Ushered in formally by the General Allotment Act of 1887, the federal policy of assimilation and allotment of Indian lands in severalty dominated the federal-tribal scene for half a century. The allotment policy was officially repudiated in 1934, but it nonetheless continues to influence and inform the Supreme Court's Indian law jurisprudence today.

A. Allotment and Assimilation

Prior to the late nineteenth century, federal Indian policy was primarily oriented towards the separation of tribes and citizens. In the early decades of the century, removal of the tribes to "unsettled" territory west of the Mississippi was the preferred federal approach.[18] The removed tribes were accorded lands in the new country in exchange for their cession of aboriginal territories in the southeast.[19] By the end of the Civil War, however, the focus of the separatist idea had shifted. As non-Indian settlement of the trans-Mississippi West burgeoned, federal policy shifted from the removal of tribes to the Indian Territory to the isolation of tribes in pockets of lands carved out of aboriginal territories.[20]

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18. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 78-79 (Rennard Strickland ed., 1982 ed.).

19. *See id.* at 79-92; ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 4-5 (1940).

20. *See* COHEN'S HANDBOOK, *supra* note 18, at 103-05. Indian Commissioner Charles E. Mix noted that, in the absence of "distant and extensive sections of country which we can assign them," the reservation system was "the only course compatible with the obligations of justice and humanity." 1858 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 92, 94 (Francis Paul Prucha, ed., 2d ed. 1990).

Prior to 1871, reservations were generally set aside by treaty. When treaty-making with the tribes ended in that year, *see* 25 U.S.C. § 71 (1988), Congress continued to create reservations by statute, most of which ratified agreements reached with tribes. COHEN'S HANDBOOK, *supra* note 18, at 127. Moreover, numerous reservations were created by executive order between 1855 and 1919. *Id.* at 127-28.

The purposes of the reservation policy were diverse. In part, like the removal policy, the reservation policy was intended to ease hostilities and tensions between tribes and settlers by segregating the two groups from one another.[21] Moreover, reservations were designed to preserve the tribes from destruction and, at the same time, to provide a laboratory for teaching Indians the virtues of agriculture and civilization.[22] Indian lands set aside as reservations were eventually recognized as being "in trust" for the tribes;[23] under that trust status the United States holds the fee while the tribes retain beneficial ownership.

Contained within the reservation policy of the mid-to-late nineteenth century were the origins of the allotment policy to come. Treaties concluded in the 1850s to make way for white settlement of Kansas and Nebraska included provisions for allotment of lands,[24] as did treaties in the Pacific Northwest.[25] Throughout the reservation era, various Commissioners of Indian Affairs advocated the allotment of the reservations as the next logical step towards the civilization and improvement of the Indians.[26] Nonetheless, widespread dissatisfaction with the reservation policy was slow

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21. *See, e.g.*, 1850 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 81-82; 1869 SECRETARY OF THE INTERIOR ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 129. Professor Wilkinson refers to this as the policy of "measured separatism." CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 16 (1987).

22. Indian Commissioner William P. Dole proclaimed that "the policy, recently adopted, of confining the Indians to reservations . . . is the best method yet devised for their reclamation and advancement in civilization." 1862 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 95; *see also* I FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 463-65 (1984) (discussing Commissioner Dole's reign); *id.* at 439 (noting that Sioux treaties of 1851 contained "the usual agricultural, educational, and general civilization provisions").

23. Morrison v. Work, 266 U.S. 481, 485 (1925) (noting that as to tribal property, the federal government acts with "the powers of a guardian and of a trustee in possession"). The General Allotment Act of 1887 represents the first time that Congress specified that Indian lands were to be held "in trust" for the owners. For a discussion of the origins of the trust status of Indian lands and the parallels to the development of trust status for public lands, see Russel L. Barsh & James Y. Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 640-47 (1981).

24. 1856 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 89-90.

25. *See, e.g.*, Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994), discussed *infra* at text accompanying notes 136-41 (discussing Treaty of Point Elliot (1855)).

26. *See, e.g.*, 1862 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 95; 1876 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 147, 149; 1880 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 153, 154-55; *see also* COHEN'S HANDBOOK, *supra* note 18, at 98-102.

to build. Not until the late 1880s did Congress begin actively pursuing a new approach.

The 1880s witnessed the fundamental shift in federal policy from separatism within reservations to assimilation. And yet the goals of the allotment and assimilation era were in many respects continuations of the reservation goals: agriculture, Christianity, and citizenship were to be the ultimate outcome.[27] Federal policy, however, was no longer content with separating the tribes, protecting their autonomy, and providing Indian agents as teachers of change. Instead, federal policy turned toward the assimilation of Indians into the general body of citizens.

The primary agent of civilization and citizenship was to be private land ownership. Despite the "flat, miserable failure" of previous experiments in allotment,[28] advocates of the policy believed that individual ownership of property would turn the Indians from a savage, primitive, tribal way of life to a settled, agrarian, and civilized one.[29] Assimilation was viewed as both humanitarian and inevitable.[30] The cornerstone of this social engineering, this "legal cultural genocide,"[31] was the replacement of tribal communal ownership of land with private property. In the General Allotment, or Dawes, Act of 1887,[32] Congress authorized the break up of the reservations. Indians were to receive allotments of land in severalty, and the remaining surplus lands were to be opened to settlement.[33]

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27. II FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 659 (1984).

28. HOUSE COMM. ON INDIAN AFFAIRS, MINORITY REPORT ON LAND IN SEVERALTY BILL, H.R. REP. NO. 1576, 46th Cong., 2d Sess. 7-10 (1880), *reprinted in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900 121, 125 (Francis Paul Prucha ed., 1973) (describing the Catawba allotment program). Allotment had been tried on a small scale on several occasions prior to the General Allotment Act. In almost all instances, however, the experiment was a failure. Lands were allotted immediately into individual fee ownership, and too often the Indian owners, unaccustomed to private property, lost their lands to white speculators, banks, or sheriffs' auctions. *See, e.g.*, II PRUCHA, *supra* note 27, at 663; COHEN'S HANDBOOK, *supra* note 18, at 129-30; Paul W. Gates, *Indian Allotments Preceding the Dawes Act, reprinted in* THE RAPE OF INDIAN LANDS 141 (Paul W. Gates ed., 1979).

29. "Individual land ownership was supposed to have some magic in it to transform an Indian hunter into a busy farmer." DELOS S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 141 (Francis Paul Prucha ed., 1973).

30. II PRUCHA, *supra* note 27, at 625-26, 662; OTIS, *supra* note 29, at 8-32. As one historian has noted, "[W]hen a veritable phalanx of philanthropists turned their minds to helping the Indian in the post-Civil War period, his fate was sealed." WILCOMB E. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 12 (1986).

31. Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 721 (1986).

32. 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-381 (1983)). The General Allotment Act is also known as the Dawes Act after its sponsor.

33. Under the authority of the General Allotment Act, 118 reservations were allotted and 44 of those

1. Allotments and Fee Patents

The central feature of the General Allotment Act was the allotment of the reservations in severalty. Under the Act, individual Indians received a certain number of acres of reservation land.[34] In recognition of prior failed attempts to allot Indian lands in fee, however, Congress provided that allotted lands would be held in trust for the individual allottee for a period of twenty-five years.[35] During that time, the allottee was expected to assimilate to agriculture, to Christianity, and to citizenship. At the end of the twenty-five year transition period, the individual would receive a patent in fee, free of encumbrance and fully alienable.[36] With the acquisition of a fee patent, the allottee would also be subject to the civil and criminal laws of the state.[37]

The twenty-five year trust period came under attack, however, by those who viewed the continued federal guardianship as an obstacle to the goal of assimilation.[38] As a result, Congress amended the General Allotment Act in 1906 to authorize the early issuance of fee patents.[39] The Burke Act

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were opened to non-Indian homesteading. 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 309 (1977).

34. The exact size of allotments varied over time. As originally enacted, the General Allotment Act varied the size of the allotment by the status of the individual. Each head of family received 160 acres; single adults received 80 acres; and orphans and other single persons received even less. General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887). The Act was amended in 1891 to equalize the size of allotments: "each Indian" was now entitled to 80 acres. Act of Feb. 28, 1891, ch. 383, § 1, 26 Stat. 794. The Act was amended again in 1910 to differentiate the size of allotments depending upon the type of land. After 1910, allotments of agricultural land remained at 80 acres, while allotments of grazing land were increased to 160 acres. Act of June 25, 1910, ch. 431, § 17, 36 Stat. 859; *see* 25 U.S.C. § 331.

35. General Allotment Act, ch. 119, § 5, 24 Stat. 389 (1887); *see* 25 U.S.C. § 348 (1983); *see* OTIS, *supra* note 29, at 50.

36. General Allotment Act, ch. 119, § 5, 24 Stat. 389 (1887); *see* 25 U.S.C. § 348.

37. 25 U.S.C. § 349 (1983). The original language of the Act provided that those to whom allotments had been made "shall . . . be subject to the laws, both civil and criminal, of the State or Territory in which they reside." General Allotment Act, ch. 119, § 6, 24 Stat. 390 (1887). In 1905, the Supreme Court determined that this language subjected allottees to state civil and criminal jurisdiction upon the issuance of a trust patent. *In re* Heff, 197 U.S. 488, 502-03 (1905). Congress promptly amended the Act to provide that state jurisdiction would only take effect "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . ." Burke Act of 1906, 34 Stat. 182. The Court later clarified that the issuance of a fee patent did not subject the owner to all state laws, but only those consistent with the Constitution and acts of Congress. United States v. Nice, 241 U.S. 591, 600 (1916).

38. FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 165 (1984). The allotment program was proceeding apace during the early years. Between 1887 and 1900, nearly 5 million acres were allotted to more than 53,000 individuals. OTIS, *supra* note 29, at 87. Under the General Allotment Act of 1887, however, none of these lands would pass into fee status until 1912 at the earliest.

39. Burke Act of 1906, 34 Stat. 182 (amending § 6 of the General Allotment Act) (codified at 25 U.S.C. § 349).

authorized the Secretary of the Interior to issue a fee patent to an allottee at any time, upon a determination that the individual was "competent and capable of managing his or her affairs."[40] Upon the issuance of one of these premature patents, the land was expressly subject to alienation, encumbrance, and taxation.[41]

The effect of the Burke Act was immediate and substantial. In the three years following the passage of the 1906 act, patents were issued upon the recommendation of the Indian superintendent.[42] Of the 2744 applications made during those years, all but 68 were granted.[43] Surveys in 1908 showed that more than 60 percent of the premature patentees lost their lands.[44] In 1909, an alarmed Commissioner of Indian Affairs began requiring a more detailed showing that the allottee was competent, and the approval rate dropped to approximately seventy percent of all applicants.[45]

That relief was short-lived. In 1913, a new Commissioner of Indian Affairs not only reinstated the liberalized policy, but expanded upon it.[46] Initially, the Indian superintendents were ordered to submit the names of competent Indians, but that procedure was soon replaced by "competency commissions," charged with roaming the reservations in search of allottees who could be issued premature patents.[47] Under pressure to liberate the Indians from federal guardianship, the Indian Office issued patents to unqualified allottees and, in many cases, to allottees who neither applied for nor wanted to accept them.[48] Despite reports showing that in many cases

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40. *Id.*

41. *Id.*

42. COHEN'S HANDBOOK, *supra* note 18, at 136.

43. *Id.* The Commissioner of Indian Affairs announced a policy of considering all applications with a view toward recommending issuance of a patent, in order to free Indians from the "shackles of wardship." 1906 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 208, 209.

44. JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934 89 (1991).

45. COHEN'S HANDBOOK, *supra* note 18, at 136.

46. *Id.* at 138.

47. MCDONNELL, *supra* note 44, at 91, 93-94.

48. *Id.* at 98. In fact, allottees issued premature patents against their will could not avoid the patents by refusing to accept them. The Interior Department would mail the patent to the allottee and inform the tax collector, who was then authorized to collect the taxes authorized by the Burke Act. *Id.* at 99. The Department would also mail the patent to the superintendent of the reservation, with instructions to record the patent and then send it to the allottee by registered mail if the allottee refused to accept it. *See* Glacier County v. United States, 99 F.2d 733, 734 (9th Cir. 1938) (describing practices on the Blackfeet Reservation). By the 1920s, however, the Ninth Circuit held that a forced-fee patent, which the allottee had neither applied for nor accepted, did not transfer fee title. United States v. Benewah County, 290 F. 628, 630-31 (9th Cir. 1923).

90 percent or more of premature and forced-fee allottees lost their lands,[49] the liberalized policy was formalized and further expanded in 1917.[50]

In that year, Indian Commissioner Sells announced that fee patents would simply be issued to all allottees of less than one-half Indian ancestry, while competency determinations would still be required for those of one-half or more Indian blood.[51] The effects were again devastating. In the eighteen months following Sells' policy announcement, the Indian Office issued premature patents for approximately one million acres, more than had been patented in the previous ten years.[52] Similarly, between 1917 and 1920, more than 17,000 patents were issued, twice as many as were issued in the previous ten years.[53] The havoc caused by Sells' policy resulted in a loss of support for liberalized patenting, and in 1920 a new Commissioner abolished the competency commissions and declared that no fee patents would issue without a determination of competency regardless of blood quantum.[54]

Between the two methods—expiration of the trust period and premature patents—thousands of patents in fee were issued, often amounting to several thousand in a single year.[55] Once a patent in fee was issued, the land could be alienated, encumbered, and at least as to Burke Act patents, taxed.[56] Thousands of Indian owners disposed of their lands by voluntary or fraudulent sales; many others lost their lands at sheriffs' sales for nonpayment of taxes or other liens.[57] By the end of the allotment era, two-thirds of all the land allotted—approximately 27 million acres—had passed into non-Indian ownership.[58]

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49. MCDONNELL, *supra* note 44, at 100.

50. 1917 COMMISSIONER OF INDIAN AFF. ANN. REP. , *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 213-14 (announcing a policy of "greater liberalism" in the issuance of early fee patents).

51. *Id.* at 214.

52. MCDONNELL, *supra* note 44, at 107.

53. *Id.* at 110.

54. *Id.*

55. COHEN'S HANDBOOK, *supra* note 18, at 136-37.

56. County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 254 (1992). This issue of the taxability of lands patented in fee at the expiration of the twenty-five year trust period was the central question in *County of Yakima*. *Id.* The Court determined that all fee patents issued under the General Allotment Act, whether patented early or not, are subject to state property taxes. *Id.* The *County of Yakima* decision is discussed *infra* at part III.

57. MCDONNELL, *supra* note 44, at 100-01, 106-07.

58. COHEN'S HANDBOOK, *supra* note 18, at 138.

2. Surplus Lands

Despite the devastating effect of fee patents, the 27 million patented acres lost to non-Indians represented only about one-third of the tribal losses during the allotment era.[59] More than twice as much land—some 60 million acres—was lost under the surplus lands program.[60] The General Allotment Act provided that, once reservation lands were allotted in severalty, the remaining "surplus" lands could, at the discretion of the President, be opened to non-Indian settlement.[61] Non-Indian settlement interspersed with Indian allotments, assimilation advocates believed, would promote interaction between citizens and Indians and encourage the allottees to adopt white ways. Allotment would remove the "dead weight" of communal tribal lands that kept the Indians from full participatory citizenship.[62]

As enacted, the General Allotment Act called for tribal consent to cession of the surplus lands.[63] Although multiple cession agreements were negotiated with tribes, many of the early efforts were thwarted by the tribes' refusal to sell or their demand of a high price.[64] In 1903, however, the

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59. Between fee patents and the surplus lands acts, tribes lost approximately 90 million acres of tribal trust lands between the onset of the allotment policy in 1887 and its official repudiation in 1934. COHEN'S HANDBOOK, *supra* note 18, at 138.

60. *Id.* Of those, approximately 38 million acres were ceded outright to the United States, and another 22 million were opened to homesteading after allotments were made. 1 AMERICAN INDIAN POLICY REVIEW COMMISSION FINAL REPORT, *supra* note 33, at 309.

61. General Allotment Act, ch. 119, 24 Stat. 388, 389-90 (1887).

62.

> [W]e need now to face the fact, and deal with it, that the surplus of the reservation after allotment is a danger that threatens much, and a dead weight that hangs heavily about the newly made citizen's neck. The wise disposal and conversion of this value, if rightly used,—crushing burden, if not so disposed of,—is the next most difficult problem and pressing duty before us.

Charles C. Painter, *The Indian and His Property in Proceedings of the Seventh Annual Meeting of the Lake Mohonk Conference of Friends of the Indian* 84-89 (1889), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 28, at 114, 116; *see also* WASHBURN, *supra* note 30, at 30.

Support for the surplus lands program, like support for allotment in severalty, was widespread. One of the few dissenting voices came from the minority report in the House of Representatives:

> The main object of the bill is in the last sections of it, not in the first. The sting of this animal is in its tail. When the Indian has got his allotments, the rest of his land is to be put up to the highest bidder, and he is to be surrounded in his allotments with a wall of fire, a cordon of white settlements, which will gradually but surely hem him in, circumscribe him, and eventually crowd him out.

HOUSE COMM. ON INDIAN AFFAIRS, MINORITY REPORT ON LAND IN SEVERALTY BILL, H. REP. NO. 1576, 46th Cong., 2d Sess. 7-10 (1880), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 28, at 121, 128.

63. General Allotment Act, ch. 119, § 5, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331 (1988)).

64. HOXIE, *supra* note 38, at 156.

Supreme Court held in *Lone Wolf v. Hitchcock* that tribal consent to the loss of surplus lands was not required, notwithstanding either the General Allotment Act or a specific treaty provision requiring written consent to any cession agreement.[65] Thereafter, Congress unilaterally enacted surplus lands acts, contending that rapid disposal of the surplus lands would increase the value of Indian allotments, give the Indian allottees role models to emulate, and generally "be a great improvement upon their present condition."[66] The Commissioner of Indian Affairs concurred, noting that if Congress waited for tribal consent, "it will be fifty years before you can do away with the reservations."[67] Within two years of the *Lone Wolf* decision, Congress enacted six surplus lands acts without tribal consent or negotiation, and in 1905 four of the affected reservations were opened to white settlement.[68]

The post-*Lone Wolf* surplus lands acts followed a pattern. "They were proposed by western politicians, approved by a voice vote in Congress, and greeted with cheers from local settlers and businessmen."[69] Tribal advocates were reduced to campaigning for adequate compensation for the homesteaded lands.[70] Once tribal consent was no longer at issue, the focus of the surplus lands program had shifted from assimilation of the Indians to the development and white settlement of the western states.[71]

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65. 187 U.S. 553, 567 (1903). The federal government entered into a cession agreement with the Kiowa and Comanche Tribes pursuant to the General Allotment Act and a treaty provision requiring the written consent of three-quarters of the adult males of the combined tribes. *Id.* at 554. The government obtained 456 signatures, and in 1900 Congress enacted the cession agreement into law. *Id.* at 554-55. Lone Wolf challenged the action, claiming that the number of signatures represented less than three-quarters of the adult males, and that many of the signatures had been obtained by fraud. *Id.* at 556. The Court refused to address Lone Wolf's arguments, holding that the statutory cession was within the plenary power of Congress over Indian affairs, and beyond the power of the courts to review. *Id.* at 567-68.

66. II PRUCHA, *supra* note 27, at 868 (quoting the House Committee on Indian Affairs, reporting on the 1904 Rosebud Sioux Surplus Lands Act).

67. *Id.* (quoting testimony before the House Committee on Indian Affairs by Commissioner William A. Jones). Jones expressly rejected the notion of seeking tribal consent where a treaty provision so required, rhetorically questioning whether the Congress would ask consent from "a child 8 or 10 years of age." *Id.*

The meaning of Jones's phrase "do away with the reservations" is debatable. *Compare* John T. Hughes & Tom Tobin, Comment, *New Town et al.: The Future of an Illusion*, 18 S.D. L. REV. 85, 103 (1973) ("In 1904, to 'do away with the reservation,' was also to do away with the boundaries of the reservation.") *with* Susan D. Campbell, Note, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 AM. INDIAN L. REV. 57, 85 (1984) (arguing that "at no point" do the acts or their legislative histories "mention a dismantling of the reservation system or termination of federal jurisdiction or guardianship").

68. HOXIE, *supra* note 38, at 157.

69. *Id.* at 165.

70. *Id.*; II PRUCHA, *supra* note 27, at 869.

71. HOXIE, *supra* note 38, at 158.

B. Repudiation of Allotment

The 1920s represented a decade of transition from the devastation of the allotment years to a formal change in federal policy in the early 1930s. In 1921, the liberal policy of granting forced-fee and other premature patents was officially abandoned,[72] and the number of premature patents steadily declined throughout the 1920s. By the early 1930s, the Indian Office rejected more than 50 percent of patent applications, and issued fewer than 300 patents in a two-year period.[73] Nonetheless, patentees continued to lose their lands in "staggering" numbers.[74] As a result, the Indian Office began to urge legislation that would permit the cancellation of forced-fee patents, a proposal that received considerable impetus from a Ninth Circuit decision holding that fee title did not pass to the allottee under a forced-fee patent.[75] Congress responded in 1927, authorizing the Secretary of the Interior to cancel forced-fee patents.[76] The effect of the legislation was limited, however; patents could be canceled only if the patent was issued without the application or consent of the allottee and if the owner had not sold or mortgaged the land.[77] Because of those limitations, the Interior Department

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72. COHEN'S HANDBOOK, *supra* note 18, at 137.

73. MCDONNELL, *supra* note 44, at 120.

74. *Id.* at 113 ("A staggering number of Indians lost their land and became paupers, as many as 75 to 100 percent of the patentees on most reservations."); *see also* AMERICAN INDIAN POLICY REVIEW COMMISSION FINAL REPORT, *supra* note 33, at 309 ("By 1934, 3 percent of the allotted land converted to fee patents remained in Indian ownership.").

75. United States v. Benewah County, 290 F. 628, 630-31 (9th Cir. 1923). The court noted that the allottee had neither applied for the patent nor accepted it when it was issued. While the Burke Act authorized premature patents, the court found it must "be held to mean that such action by the Secretary can be had only upon the application of the allottee or with his consent." *Id.* at 631. On the issue of forced-fee patents generally, and attempts to redress the problem through the federal courts, see LeAnn L. LaFave, *South Dakota's Forced Fee Indian Land Claims: Will Landowners Be Liable for Government's Wrongdoing?*, 30 S.D. L. REV. 59 (1984).

76. Act of February 26, 1927, ch. 215, §§ 1-2, 44 Stat. 1247 (codified at 25 U.S.C. §§ 352a-352b (1988)).

77. The law was amended in 1931 to permit the cancellation of a forced-fee patent on land remaining to the patentee where only part of the land had been lost. Act of Feb. 21, 1931, ch. 271, 46 Stat. 1205 (codified at 25 U.S.C. § 352b (1988)).

One of the effects of cancellation was that the property was not subject to taxes during the years the forced-fee patent was in effect. *See, e.g.*, Glacier County v. United States, 99 F.2d 733, 734-35 (9th Cir. 1938); *see also Benewah County*, 290 F. at 630-32 (holding likewise for forced-fee patents canceled by the Secretary prior to the 1927 Act). Both *Glacier County* and *Benewah County* involved forced-fee patents that had been canceled by the Secretary of the Interior before the land had passed out of the allottees' hands. Accordingly, no court held that a forced-fee patent was inadequate to vest fee title in a subsequent non-Indian purchaser of the allotment. That result, of course, is curious: a forced-fee patent was inadequate to pass fee title to the allottee, *see Benewah County*, 290 F. at 630-31, but adequate to pass fee title to a subsequent non-Indian purchaser.

ultimately canceled only some 470 forced-fee patents out of approximately 10,000 that were issued.[78]

The decade culminated with the issuance of the Meriam Report in 1928.[79] The report, a nongovernmental study undertaken at the request of the Secretary of the Interior, investigated Indian policy and administration and their impacts on Indian life. The destructive effects of the allotment policy documented in the Meriam Report—effects on the economic, social, cultural, and physical well-being of the tribes—generated sympathy and popular support for a change in the federal approach. The report also called for greater respect for Indian culture, an attitude that reflects what historian Frederick Hoxie has termed the early twentieth-century "redefinition of Indian assimilation" to accommodate cultural diversity.[80] Publication of the Meriam Report was closely followed by appointment of a new Commissioner of Indian Affairs, who had some success in implementing the recommendations of the report.[81]

The appointment of John Collier as Commissioner in 1933, however, set the stage for wide-ranging reform of federal Indian policy and programs. Within four months of taking office, Collier effectively put an end to allotment and the practice of issuing fee patents by directing the superintendents not to submit either certificates of competency or fee patents.[82] The following year, Collier's goal of legislation to reverse allotment was realized when Congress enacted the Indian Reorganization Act of 1934.[83]

With the Indian Reorganization Act ("IRA"), Congress put an official end to the allotment program and formally repudiated the assimilation policy.[84]

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78. MCDONNELL, *supra* note 44, at 118.

79. INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (L. Meriam ed., 1928). *See generally* COHEN'S HANDBOOK, *supra* note 18, at 144-45. Brief excerpts from the Meriam Report are reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 219-21.

80. HOXIE, *supra* note 38, at 241. For a discussion of other social and political factors that contributed to the demise of the allotment policy, see John W. Ragsdale, Jr., *The Movement to Assimilate the American Indians: A Jurisprudential Study*, 57 UMKC L. REV. 399, 421-23 (1989).

81. COHEN'S HANDBOOK, *supra* note 18, at 145. Reform efforts during these years were primarily limited by the Great Depression. GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-45 16 (1980).

82. COHEN'S HANDBOOK, *supra* note 18, at 146; II PRUCHA, *supra* note 27, at 951.

83. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-495 (1988)).

84. In addition to the provisions relating to land discussed here, a central feature of the IRA was the authorization for tribes to organize governments and obtain charters. Ch. 576, §§ 16-17, 48 Stat. 984 (codified at 25 U.S.C. §§ 476-477 (1988)). The IRA's focus on tribal self-government represented a significant break with the assimilation policy in effect for the previous half-century. *See generally* TAYLOR, *supra* note 81; BRIAN W. DIPPIE, THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY 297-321 (1982).

The first sections of the IRA contained what Collier called the "repair work" regarding tribal lands.[85] Section 1 of the IRA prohibited any further allotment of tribal land.[86] Section 2 provided that any allotments then held in trust status would continue in trust until Congress provided otherwise.[87] Section 3 authorized the Secretary of the Interior to restore any remaining surplus lands to tribal ownership,[88] and the Secretary subsequently halted any disposition of surplus lands on thirty reservations pending the implementation of § 3.[89] Finally, § 5 authorized the Secretary to take new lands into trust and to add those lands to reservations.[90]

In effect, Congress halted the allotment program where it stood in 1934, and provided that certain ravages of the policy could be in part ameliorated. What Congress did not do, however, was restore fee patented or homesteaded lands to tribal ownership.[91] Although the Secretary was authorized to acquire fee lands and return them to trust status and tribal ownership, these provisions affected only a fraction of the millions of acres lost to fee ownership. The vast majority of lands that had passed into fee during the

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85. 1934 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 225. Many of Collier's envisioned repairs, unfortunately, never materialized.

86. Ch. 576, § 1, 48 Stat. 984 (codified at 25 U.S.C. § 461 (1988)).

87. Ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (1988)). Today, an allottee can petition the Secretary of the Interior to remove the trust restrictions and issue a fee patent. *See* 25 C.F.R. §§ 152.4-.5 (1993).

88. Ch. 576, § 3, 48 Stat. 984 (codified as amended at 25 U.S.C. § 463 (1988)).

89. 54 Interior Dec. 559 (1934). Section 3 of the IRA authorized the Secretary "to restore to tribal ownership the remaining surplus lands of any Indian reservation. . . ." The Secretary interpreted this to mean that he was authorized to restore any undisposed-of surplus lands that remained within reservation boundaries as of 1934, but not surplus lands that had been disestablished from the reservations. *See generally infra* part IV. Accordingly, the Secretary limited the temporary withdrawal of surplus lands from disposition to those reservations where the surplus lands were not ceded outright to the United States for a sum certain payment, but rather opened to homesteading with the federal government acting as realtor for the lands and trustee for the proceeds of the sales. 54 Interior Dec. at 560. The Commissioner of Indian Affairs identified thirty reservations in thirteen states as eligible for this temporary withdrawal. *Id.* at 561-62, 564.

90. Ch. 576, § 5, 48 Stat. 984 (codified at 25 U.S.C. § 465 (1988)). The BIA was initially aggressive in seeking funds to implement the § 5 purchase program, but appropriations steadily declined. Between 1936 and 1974, some 595,157 acres were restored to tribal ownership, but more than three times that many acres of existing tribal lands, a total of 1,811,010, were condemned for other purposes. Close to half a million of those acres were taken for federal water projects alone. 1 AMERICAN INDIAN POLICY REVIEW COMMISSION FINAL REPORT, *supra* note 33, at 309-10.

91. As the Supreme Court noted recently, for the most part "Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands." *County of Yakima*, 502 U.S. at 255. Nonetheless, as Indian Commissioner Collier noted, "While Congress did not specifically direct the consolidation of Indian lands broken up and checkerboarded with white holdings in the allotment process, it authorized such consolidation and set up the machinery for it." 1934 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 225-26.

allotment years remains in fee today: the legacy of allotment that gives rise to the modern Court decisions divesting tribes of both territory and sovereignty.

C. The Modern Policy Era

The reorganization era was short-lived. Criticism of the IRA began immediately[92] and, coupled with pro-assimilationist social forces revived after World War II, led to the termination era of the 1940s and 1950s.[93] Termination was assimilation with a vengeance. Congress withdrew federal recognition, liquidated tribal assets, including the land base, and transferred jurisdiction over Indians to the states.[94] The loss of tribal territory and sovereignty was immediate and complete. In that sense, termination was if anything more brutal than allotment, but it affected, by comparison, few people and little land.[95]

Like the reorganization era that it replaced, the termination era also was short-lived. Even as the final termination plans were developed and implemented in the late 1950s and early 1960s, federal policy turned against the forced termination of tribes.[96] The swing in federal policy back to the protection and promotion of tribal autonomy was ushered in by President Johnson, who called in 1968 for a policy of "self-help, self-development, and self-determination" for Indians.[97] Two years later, President Nixon

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92. *See generally* Laurence M. Hauptman, *The Indian Reorganization Act, in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S 131, 139-43 (Sandra L. Cadwalader & Vine Deloria, Jr., eds., 1984).

93. On the forces leading to the demise of the reorganization era, see TAYLOR, *supra* note 81, at 139-49. On the termination era, *see generally* DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (1986); Charles F. Wilkinson & Eric R. Biggs, *Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

94. Many tribes that were not terminated were nonetheless subjected to state jurisdiction under the major piece of general legislation to come out of the termination years. Public Law 280, enacted in 1953, subjected tribes in a number of states to full state civil and criminal jurisdiction and made it possible for other states to assume the same jurisdiction. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (1988)(criminal) and 28 U.S.C. § 1360 (1988)(civil)). *See generally* Carole Goldberg-Ambrose, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

95. More than 100 tribes were terminated. Most of the terminated tribes were small in population and territory, so that termination ultimately affected some 11,466 people and about 1.3 million acres of land. COHEN'S HANDBOOK, *supra* note 18, at 181-82.

96. One of the outcomes of the policy change was a series of restoration acts for the terminated tribes. The restoration movement began with the Menominee Restoration Act of 1973, 87 Stat. 770 (codified at 25 U.S.C. §§ 903-903f (1988)), and by the 1990s virtually all 109 terminated tribes were restored to federal recognition.

97. "The Forgotten American": The President's Message to the Congress on Goals and Programs

inaugurated the modern federal Indian policy of self-determination, proposing federal promotion of tribal self-determination, sovereignty, and control over Indian country.[98] In line with the executive branch, Congress shortly embarked on a legislative agenda designed to carry the self-determination policy into effect.[99]

Subsequent administrations have continued and expanded the basic self-determination policy announced by Nixon. In 1983, President Reagan proclaimed a "government-to-government" relationship between the tribes and the United States.[100] The government-to-government policy was reaffirmed by President Bush[101] and most recently by President Clinton,[102] who promised as well "to honor and respect tribal sovereignty."[103] Congress also has continued to legislate for tribal control over Indian country.[104]

The cornerstones of modern federal Indian policy—tribal control over the Indian country and the government-to-government relationship—are diametrically opposed to the tenets of the assimilation policy. Instead of the assimilation-era goal of breaking up tribal territories into allotments and fee lands, modern policy promotes and protects tribal control over Indian country. Far from contemplating the dissolution of the tribes, modern policy rests on an intergovernmental relationship between the federal government

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for the American Indians, PUB. PAPERS 335 (1968-69).

98. Special Message to the Congress on Indian Affairs, PUB. PAPERS 564 (1970). Nixon is generally credited as the architect of the federal policy of tribal self-determination.

99. *See, e.g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451 (1988) (promoting tribal responsibility "for the utilization and management of their own resources"); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b)(1988) (declaring Congress's "commitment to . . . the establishment of a meaningful Indian self-determination policy").

100. Statement on Indian Policy, 1 PUB. PAPERS 96, 99 (1983). President Reagan stated: "Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination." *Id.* at 96.

101. Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 27 WEEKLY COMP. PRES. DOC. 783 (June 14, 1991).

102. Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936 (Apr. 28, 1994).

103. Remarks to American Indian and Alaska Native Tribal Leaders, 30 WEEKLY COMP. PRES. DOC. 941 (Apr. 29, 1994). *See also* Memorandum, *supra* note 102, at 936 (pledging that federal activities affecting tribes will be undertaken in a manner "respectful of tribal sovereignty").

104. A prime example is the Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. No. 102-84, 105 Stat. 1278 (amending provisions of the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n(1988)). The Act provides a small number of tribes with block grant moneys that the tribes use as tribal, rather than federal, priorities dictate. *See* Clinton, *supra* note 5, at 138. Other examples of recent congressional solicitude for tribal control include the American Indian Agricultural Resource Management Act of 1993, Pub. L. No. 103-177, 107 Stat. 2011 (intended to increase tribal control over agricultural lands management) and the Clean Air Act Amendments of 1990, 42 U.S.C. § 7602 (authorizing tribal implementation plans for reservation air quality standards, under which tribal authority will extend to all lands within the reservation, notwithstanding the issuance of fee patents).

and the Indian nations. Respect for tribal sovereignty is the stated aim of the current administration.

Federal Indian policy is set by Congress and the President; those branches of government determine the tenor of federal relations with the tribes during any given policy era. But full implementation of federal policy requires the cooperation of the judicial branch. Despite disingenuous statements that the Court does not make policy,[105] the Court certainly furthers or impedes policy in the course of its decisions. And the difficulty in federal Indian law today, in cases implicating the allotment policy or its lingering effects, is the Court's insistence upon rendering decisions consistent not with the modern policy of self-determination, but rather with the allotment policy of the assimilation years. The Court has determined upon a path of effectuating the allotment policy, to the detriment of the tribes and the schizophrenia of federal interactions with the Indian nations.

The next three parts explore the Court's approach in three sets of cases. Part III looks at the Court's recent interpretation of the General Allotment Act itself in *County of Yakima v. Yakima Indian Nation.* Part IV examines the Court's decisions in the reservation disestablishment cases, those involving the allotment-era surplus lands acts. And part V critiques the Court's decisions in the regulatory jurisdiction cases, those involving the nexus between tribal sovereignty and fee lands within tribal territorial borders.

III. THE DAWES ACT RIDES AGAIN: *COUNTY OF YAKIMA V. YAKIMA INDIAN NATION*

The allotment policy is reminiscent of a horror movie villain, defeated in the final scenes and officially dead. But as the closing credits roll, the faint continuing throb of a heartbeat can be detected, and soon sequel after sequel resurrects the villain to continue its course of destruction. Like the villain, allotment was pronounced dead in 1934 with the passage of the Indian Reorganization Act. But like the villain, the allotment policy lurked on below the surface, waiting to break free. Over the last two decades, under the activating hand of the Supreme Court, the policy has sprung back to life. If the Court continues on its present course of giving effect where possible to statutes and policies of the allotment era, tribal sovereignty—tribal territorial sovereignty—is at risk.

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105. *See, e.g.*, Justice Scalia's statement to that effect in *County of Yakima*, 502 U.S. at 265-66.

The Court's recent interpretation of the General Allotment Act itself is in many ways the paradigm illustration of the problem. In *County of Yakima v. Yakima Indian Nation*,[106] the Court was asked to determine whether the General Allotment Act permitted state property taxation of former allotments now held in fee by Indian owners. Despite conflicting plausible interpretations of the statute, and despite being squarely presented with the inconsistency between the policy of allotment and the present policy of self-determination, the Court chose to read the General Allotment Act in light of its assimilationist underpinnings. In holding that the Act permitted state real property taxes, the Court construed the Act to further the goals of the allotment policy, notwithstanding the congressional repudiation of both the policy and its underlying doctrine of assimilation.

County of Yakima concerned the interpretation of §§ 5 and 6 of the General Allotment Act. Section 5 addressed the issuance and expiration of trust patents.[107] It authorized the Secretary of the Interior to issue trust patents to Indian allottees for a period of twenty-five years. At the expiration of the trust period, the allottee would receive a patent in fee, "discharged of said trust and free of all charge or incumbrance whatsoever." Any attempted conveyance of the allotment during the trust period was void. Upon the issuance of a fee patent at the expiration of the twenty-five year trust period, therefore, allotted land became alienable and subject to encumbrance.[108] The issue before the Court in *County of Yakima* was whether that fee-patented land also became taxable.

In large part, the issue arose because § 6 of the General Allotment Act expressly permits state taxation of certain fee-patented lands.[109] As initially

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106. 502 U.S. 251 (1992). For commentary on the case, see Christopher A. Karns, Note, County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation: *State Taxation as a Means of Diminishing the Tribal Land Base*, 42 AM. U. L. REV. 1213 (1993); Deborah Jo Borrero, Note, *They Never Kept But One Promise*, 67 WASH. L. REV. 937 (1992).

107. 25 U.S.C. § 348 (West 1983). Section 5 provides in relevant part:

> Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period the United States will convey the same by patent to said Indian . . . discharged of said trust and free of all charge or incumbrance whatsoever . . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void . . . .

108. The Court noted in *County of Yakima* that alienability of the fee-patented land is the "negative implication" of § 5's prohibition on alienation during the trust period. 502 U.S. at 264 n.3.

109. 25 U.S.C.A. § 349 (West 1983). Section 6 provides in relevant part:

enacted, § 6 provided that those to whom allotments had been made "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."[110] In 1905, the Supreme Court held that this language subjected allottees, immediately upon the issuance of a trust patent, to the full jurisdictional authority of the state.[111] Congress responded quickly with the Burke Act of 1906, amending § 6 of the General Allotment Act to clarify that state law was inapplicable to allottees until the issuance of a patent in fee.[112]

In addition to clarifying congressional intent regarding state jurisdiction during the trust period, the Burke Act added a proviso to § 6. The proviso authorized the Secretary of the Interior to issue fee patents upon a finding that the allottee was "competent and capable of managing his or her affairs," and expressly stated that these fee lands would then be free from "all restrictions as to sale, incumbrance, or taxation of said land."[113] Under the Burke Act amendment, then, Congress expressly authorized state property taxation of allotments patented in fee under the premature-patent system.

In *County of Yakima*, the Court folded the Burke Act proviso of § 6 into § 5 of the General Allotment Act. Under § 5, fee-patented land—that is, land patented in fee at the expiration of the twenty-five year trust period—was subject to alienation and encumbrance. Section 5 was silent on the question of taxation of fee-patented land. Nonetheless, the Court held that "when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes."[114] Interpreting § 5 by its express terms—that is, that the land was alienable and encumberable only—the Court said, would "seem strange."[115] As if

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> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 [section 5] of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . .

110. General Allotment Act of 1887, ch. 119, § 6, 24 Stat. 390.

111. *In re* Heff, 197 U.S. 488, 502-03 (1905).

112. Burke Act, ch. 2348, 34 Stat. 182 (1906). The Supreme Court also expressly overruled *In re Heff* a decade later. United States v. Nice, 241 U.S. 591, 601 (1916). In *Nice*, the Court noted that the provision for state civil and criminal laws to apply to fee owners was "to be taken with some implied limitations, and not literally." *Id.* at 600. Only those state laws which "could be applied to tribal Indians consistently with the Constitution and the legislation of Congress" were encompassed within the language of the Burke Act. *Id.*

113. 25 U.S.C. § 349 (West 1983). The proviso is reprinted in its entirety *supra* at note 109.

114. 502 U.S. at 263-64.

115. *Id.* at 263.

recognizing that oddity alone is hardly a clear manifestation of congressional consent, the Court then turned to the Burke Act and its proviso in § 6. Although the Burke Act, by its express terms, applied only to premature patents, the Court determined that the Burke Act made explicit what was already implicit in § 5: that taxation follows upon alienation and encumbrance.[116]

In so holding, the Court discarded two principles of interpretation of Indian statutes[117] that are crucial to the protection of tribal autonomy. The first of these is the long-standing rule that state taxation of Indian lands is barred unless Congress has made its intent to authorize that taxation "unmistakably clear."[118] Since at least the mid-nineteenth century, the Court has consistently refused to permit state taxation of Indians, Indian interests, and particularly Indian lands within Indian country absent congressional consent.[119] Whatever congressional approval of state property taxation may be inferred from § 5 of the General Allotment Act, it falls far short of the requisite "unmistakably clear" direction of Congress.[120] In the Burke Act, applicable only to prematurely patented lands, Congress clearly and unmistakably authorized state property taxation. No such manifestation of intent appears in § 5, applicable to lands patented in fee at the end of the twenty-five year trust period. Indeed, the fact that § 5 addresses only alienability and encumbrance while § 6, the Burke Act, addresses alienability, encumbrance, and taxation, leads inevitably to the conclusion that § 5 patents are *not* subject to taxation. In the Burke Act, Congress appears to have treated taxation as a category apart from encumbrance; otherwise the express authority for states to tax prematurely patented lands is mere surplusage because that authority would be embraced within the grant of the ability to encumber. Moreover, the use of the term

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116. *Id.* at 264. "In other words, the proviso reaffirmed for such 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes."

117. The interpretation of Indian law statutes has received considerable scholarly attention in recent years. *See* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403 (1994); Frickey, *supra* note 15; Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 378-81 (1989).

118. Montana v. Blackfeet Tribe, 471 U.S. 759, 764-65 (1985); *see also* Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1993 (1993) ("Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country . . . .").

119. *See, e.g., Sac and Fox Nation*, 113 S. Ct. at 1993; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); The New York Indians, 72 U.S. 761 (1866); The Kansas Indians, 72 U.S. 737 (1866).

120. *County of Yakima*, 502 U.S. at 273 (Blackmun, J., concurring in part and dissenting in part).

"taxation" in the Burke Act is evidence of Congress's ability to expressly authorize taxation when it intends to do so. Had Congress intended prematurely patented lands to be subject to the same requirements as other fee-patented lands, it would have used the same language. By adding the term "taxation," not included within § 5, Congress must have meant something different for prematurely patented lands than for other fee-patented lands.

And yet the Court found that § 5, by authorizing encumbrance of fee lands, impliedly authorized taxation: an implication which it said the Burke Act makes clear. To find an implication from the absence of explicit language in the relevant statute, and the presence of that language in a statute applicable to other lands, eviscerates the long-standing requirement of "unmistakably clear" congressional intent to permit state taxation in Indian country.

The second interpretive principle neglected by the Court is the canons of construction designed to interpret legislation enacted for the benefit of the tribes.[121] Originally developed for the interpretation of treaties, the canons provide that statutes are to be construed, and that ambiguities are to be resolved, in favor of the tribes.[122] In essence, the canons call for courts to

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121. The Court, in fact, went beyond neglect of the Indian law canons. It chose instead to use statutory interpretation rules from other fields, in particular the rule that implications by repeal are not favored. *Id.* at 262. By invoking that principle rather than the Indian law canons, the Court was able to avoid issues of legislative intent and policy inherent in the Indian Reorganization Act's repudiation of the allotment program. *See generally* Williams, *supra* note 117, at 429-36 (noting that Justice Scalia's majority opinion in *County of Yakima* was consistent with his approach to statutory interpretation generally, and arguing that consequently "Scalia is implicitly claiming that the legitimate basis of Congress's authority over the Indians is the same as that which justifies Congress's general authority over non-Indians.").

122. *See* COHEN'S HANDBOOK, *supra* note 18, at 221-24. Professor Frickey has argued that the canons are "hopelessly inapplicable" to assimilationist legislation because that type of legislation was not enacted for the benefit of the tribes (although he would not disagree with the outcome). Frickey, *supra* note 15, at 430 & n.204. The canons, however, should be applicable even to such assimilationist legislation as the General Allotment Act. While it is true that the traditional formulation applies the canons to statutes enacted for the benefit of the tribes, from the viewpoint of 1887, the General Allotment Act *was* enacted for the benefit of the tribes. Certainly most of its supporters believed that it was favorable to Indian interests. *See supra* notes 29-30. It is legitimate to apply the canons today to statutes that Congress believed at the time were enacted for the benefit of the tribes. Moreover, it may be that the old-fashioned phrasing "for the benefit of" the tribes obscures the true scope of the canons. In theory, because Congress acts as a trustee, *all* congressional action toward the tribes should be taken for their benefit. As a result, the canons should apply to any statute enacted specifically regarding Indian tribes, regardless of whether we would today interpret the statute as beneficial or adverse. And finally, there is a third approach suggested *infra* at text accompanying notes 123-24. One purpose of the canons is to ensure that Congress intrudes on tribal rights only when Congress clearly intends to do so. Accordingly, beneficial statutes are interpreted broadly in favor of the tribes and non-beneficial statutes (such as the General Allotment Act) are interpreted narrowly against the government. In either case, doubts and ambiguities should be resolved in favor of the tribes. And also, in either case, applying the canons of

construe statutes broadly when Indian rights are recognized or established, and narrowly when those rights are limited or abrogated.[123] The canons thus act as "the tribes' tenth amendment,"[124] ensuring that powers and authority remain with the tribes unless ceded by treaty or agreement with the tribes' clear consent and understanding, or plainly and deliberately appropriated by Congress.

Application of the canons of construction to § 5 of the General Allotment Act would require the narrow interpretation of that section, construed liberally in favor of the tribes.[125] At the outside, as the Court itself was forced to concede, § 5 merely implies that state taxation of fee-patented lands is permissible. If it was necessary for the Court to infer congressional intent from some interweaving of § 6 into § 5, then § 5 itself must be ambiguous. And if it is ambiguous, then the canons call for that ambiguity to be resolved in favor of the tribes: in favor of rejecting congressional authorization of state property taxes.[126] The Burke Act proviso of § 6, by contrast, was not ambiguous; it expressly authorized state taxation of prematurely fee patented lands. When the Court folded the Burke Act's express authorization into the silence of § 5, and arrived at a "clear" congressional intent to tax § 5 lands, it stood the canons of construction on their head. The Court construed § 5 not in favor of, but to the detriment of, the tribes, and resolved any ambiguity in its language not in favor of the tribes, but in favor of state taxation.[127]

In addition to this wholesale rejection of long-standing principles of statutory interpretation in federal Indian law,[128] the Court declined to

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construction to all Indian legislation is legitimate in light of the purposes of those canons.

123. COHEN'S HANDBOOK, *supra* note 18, at 225.

124. Barsh & Henderson, *supra* note 23, at 654.

125. As already noted, § 5 did not unambiguously authorize state taxation of Indian lands. I consequently do not find § 5 to be ambiguous: it did not clearly authorize state real property taxes and, therefore, those taxes should be barred. If the Court had used the proper state taxation analysis, application of the canons would not have been necessary. Nonetheless, the canons argument further highlights the flaws in the Court's reading of the General Allotment Act.

126. "This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

127. One of the odder features of the *County of Yakima* decision was the fact that the Court invoked the canons of construction for one aspect of the case. Having neglected the canons in its interpretation of the General Allotment Act, and having found that the Act authorized state taxation of real property, the Court turned to the second issue presented by the parties: whether the Act also authorized an excise tax on sales of Indian-owned fee lands. Noting that the Burke Act proviso in § 6 only authorized "taxation of said land," the Court applied the canons of construction to determine that the excise tax was prohibited. 502 U.S. at 269. An excise tax on the sale of land, the Court held, is a tax upon the Indian's activity of selling the land, and not a tax on the land itself. Interpreting the Burke Act liberally in favor of the tribes, and resolving any ambiguity in favor of the Indians, the Court held that the Burke Act authorized only taxation of land, and not taxation of activities concerning land. *Id.*

128. *County of Yakima* is only one of the most recent examples of the Court's rejection of the canons. Professors Clinton, Newton, and Price note that "recent cases arguably support the view that the Court

consider Congress's express repudiation of allotment and its supporting policy of assimilation. The Yakima Nation argued that the termination of the allotment program in 1934, Congress's express rejection of the assimilation policy in the Indian Reorganization Act, and the present federal policies of tribal self-government and self-determination blocked state jurisdiction over land in Indian country. The Court dismissed that argument as "a great exaggeration," stating that "the mere power to assess and collect a tax on certain real estate" would not significantly disrupt tribal self-government.[129]

That statement has potentially nasty implications for tribal sovereignty. The real estate subject to state property taxes will be former allotments now owned in fee by members of the Yakima Nation. By even the broadest reading of the regulatory jurisdiction cases discussed in part V, the Court has deprived tribes only of authority over fee lands owned by nonmembers of the tribe.[130] Tribal authority over trust lands is exclusive of the states. While the Court has never directly addressed tribal versus state authority over lands owned in fee by members of the tribe, none of the arguments advanced for depriving tribes of jurisdiction would apply.[131] The Court's reiterated finding that tribes retain sovereignty over their members[132] should support exclusive tribal jurisdiction over fee lands owned by members of the tribe. And yet the Court in *County of Yakima* found that state power to tax fee lands owned by members of the tribe, lands which should be within the exclusive jurisdiction of the tribe, has no significant impact on tribal self-government. The *County of Yakima* decision thus illustrates the need for the Court to return to a jurisprudence of territorial sovereignty, which should lead to the clear understanding that taxation by the state government in the territory of the tribal government is an unwarranted intrusion on the sovereign prerogatives of the tribe.[133] The Court's refusal to see the issue as one of territorial sovereignty, however, meant that it could cavalierly dismiss the Yakima Nation's argument that state taxation is "manifestly

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has become less willing to apply canons favoring Indians." ROBERT N. CLINTON, ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 232 (3d ed. 1991). The decision in *County of Yakima* confirms that trend. For an exploration of the Marshallian origins of the canons and their fate at the hands of subsequent Courts, see Frickey, *supra* at note 15.

129. 502 U.S. at 277.

130. As part V should make clear, I neither advocate nor agree with such a broad reading of the regulatory jurisdiction cases. The interpretation is used here only for purposes of illustration.

131. These arguments often focus on the perceived horrors of tribal jurisdiction over non-Indians or nonmembers, who cannot become tribal citizens and have no voice in tribal government. *See infra* text accompanying notes 383-91.

132. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987); United States v. Mazurie, 419 U.S. 544, 557 (1975).

133. Unfortunately, as discussed in more detail in part VI, the Court is unlikely to return to a territorial sovereignty approach to Indian law.

inconsistent" with tribal autonomy.[134] Moreover, the Court disavowed the federal courts as the proper forum for such a policy-based argument.[135] If the argument had merit, the Court said, then it should be made to Congress.

The Court's decision in *County of Yakima* is thus a paradigm of the legacy of allotment in Indian law. Faced with conflicting plausible interpretations of the General Allotment Act regarding state taxation of fee lands, the Court chose to manipulate its rule concerning congressional authorization of state taxes, to ignore the canons of construction, and to construe the Act to carry forward the policies of allotment and assimilation.

The real danger of the Court's interpretation is obvious in the subsequent use of *County of Yakima* as precedent. In *Lummi Indian Tribe v. Whatcom County*,[136] the Ninth Circuit ruled that lands allotted under the 1855 Treaty of Point Elliott and subsequently patented in fee were subject to state property taxes. The court's reasoning was simple: when the Lummi allottees received their fee patents, their land became alienable. When land is

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134. *See County of Yakima*, 502 U.S. at 265 (Blackmun, J.); *see also* Borrero, *supra* note 106, at 953-54.

135. The Court noted that §§ 5 and 6 of the General Allotment Act are, despite the repudiation of the allotment policy and program, still on the books. "Judges 'are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" 502 U.S. at 265 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)). Of course, *Mancari* dealt not with statutory remnants of repudiated policies, but with whether the Indian employment preference of the Indian Reorganization Act survived the 1972 amendments to Title VII of the Civil Rights Act of 1964. Civil Rights Act of 1964, 78 Stat. 253 (1972) (codified at 42 U.S.C. §§ 2000e-2000e(17)(1972)). The Court held that the employment preference was not repealed by the 1972 amendments, since the two statutes were "capable of co-existence." 417 U.S. at 551.

Here, however, the Court was not considering whether a later statute of general applicability repealed an earlier statute enacted for the benefit of the tribes. In *County of Yakima*, rather, the Court interpreted the General Allotment Act, both the programs and policies of which were expressly repudiated by Congress in 1934. The question for the Court should not have been whether the General Allotment Act and the self-government policies of the Indian Reorganization Act were "capable of co-existence," but rather whether, in light of the IRA and the modern federal policy of self-determination, the General Allotment Act unmistakably authorized state property taxation of fee-patented lands.

Moreover, the Court itself has noted that "'we are not obliged in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" Bryan v. Itasca County, 426 U.S. 373, 388 n.14 (1976) (quoting Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)). Both courts were referring to Public Law 280, the cornerstone legislation of the termination era, the mid-twentieth century attempt to revive assimilation. *Id.* The Court further noted in *Bryan* that "we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments." 426 U.S. at 386. What was needed in *County of Yakima* was the judicial courage displayed by the Court in *Bryan*: the courage to reject a strained interpretation that would promote assimilation and to adopt instead a rational interpretation that would promote tribal autonomy. For a discussion of the decision in *Bryan* as consistent with the Marshallian approach, see Frickey, *supra* note 15, at 429-32.

136. 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994).

alienable, it is also taxable.[137] The dissenting judge was stunned. He noted, correctly, that the court engaged in absolutely no analysis of the Treaty of Point Elliott and whether that treaty and its allotment provisions included any manifestation of congressional intent to permit state taxation of treaty-patented land.[138] The Court in *County of Yakima* had directed specific analysis of allotment instruments other than the General Allotment Act,[139] and where that analysis has been done, the taxability of fee lands is not a foregone conclusion.[140] But the Ninth Circuit Court of Appeals chose instead to employ a simplistic misinterpretation of the Court's opinion. As the dissenting judge noted, however, simplicity has never been a hallmark of federal Indian law.[141] Attempts to draw easy, bright-line rules require a court to forego the difficult and detailed analysis that the issues deserve. One of the most destructive legacies left by the Court in *County of Yakima* may be this apparent permission for the lower courts to further the

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137. *Id.* at 1358. The court found that conclusion made "virtually inescapable" by the *County of Yakima* decision. *Id. But see* Southern Ute Indian Tribe v. Board of County Commissioners, 855 F. Supp. 1194, 1200 (D. Colo. 1994) (alienability "was important only as an indicator of congressional intent to permit taxation" but "was not an independent justification for taxation."); Pease v. Yellowstone County, 21 Indian L. Rep. 6109 (Crow Ct. App. 1994) (rejecting the alienability-equals-taxability approach).

138. *Whatcom County*, 5 F.3d at 1360 (Beezer, J., dissenting).

139.

> The Yakima Nation contends it is not clear whether the parcels at issue in this case were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act. We leave for resolution on remand that factual point, and the prior legal question whether it makes any difference.

502 U.S. at 270 (citation omitted). In the hands of the Ninth Circuit, it will make no difference. Had the court reached that conclusion after careful analysis of the allotment provisions of the Treaty of Point Elliott, its stance might conceivably be defensible. But in the *Whatcom County* decision as it stands, there is nothing to defend; there is nothing other than a bright-line legacy of allotment based on faulty reasoning and bad precedent.

140. *Southern Ute*, 855 F. Supp. at 1200-02. The district court carefully analyzed the relevant statute, the Act of June 15, 1880, ch. 223, 21 Stat. 199, and applied the interpretative rule requiring "unmistakably clear" congressional intent to tax Indian lands. Based on that, the court refused to find that certain tribal lands within the reservation originally allotted under the 1880 act and subsequently reacquired from Conoco, Inc., were taxable by the state.

> [U]nder the [allotment] statutes applicable to the Utes, taxation of individual Indian allotments (and taxation of subsequent Indian transferees of those allotments, if any) was only to occur if the President issued a timely proclamation, which he did not, and after expiration of the trust period and presidential action to lift the restriction on alienation and taxation. There is no indication, clear or opaque, in the record that any of these prerequisites occurred.

Id. at 1202; *see also Pease*, 21 Indian L. Rep. at 6110 (holding that an allotment owned in fee by a member of the tribe pursuant to the Crow Allotment Act of 1920 was not taxable by the state).

141. Judge Beezer wrote: "There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future." *Whatcom County*, 5 F.3d at 1360; *see also* Joseph W. Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook*, 24 N.M. L. REV. 315, 316 (1994) (criticizing the Deskbook in part for its oversimplification and consequent distortion of the complicated field of federal Indian law).

assimilationist policies of the past with casual indifference to history, policy, and precedent.[142]

IV. ALLOTMENT AND TERRITORY: THE RESERVATION DISESTABLISHMENT CASES

While *County of Yakima* represents the Court's interpretation of the General Allotment Act itself, most of the Court's legacy of allotment derives from the present effects of the allotment program. In particular, the Court has focused on non-Indian fee ownership within Indian country, a direct outgrowth of the allotment years, as a justification for divesting tribes of territorial sovereignty. The cases terminating territorial sovereignty have fallen into two general categories: first, the reservation disestablishment cases, which concern the loss of territory itself with the concomitant loss of sovereignty; and second, the decisions, generally in regulatory jurisdiction cases, that abrogate full tribal sovereign authority over the territory that remains. This part, on allotment and territory, looks at the disestablishment cases and the legacy of allotment. The next part, then, takes up the jurisdictional decisions on allotment and sovereignty.

The reservation disestablishment cases, those that look at the loss of tribal territory, arise out of the surplus lands acts of the allotment years.[143] The General Allotment Act ("GAA") provided for the surplus lands of allotted reservations to be opened to non-Indian homesteading.[144] While the GAA authorized the sale and homesteading of the surplus lands, the program was implemented through specific surplus lands acts for particular reservations. All told, the surplus lands acts accounted for two-thirds of the tribal lands

142. The Court itself has not been immune to the urge to simplify the complex and complicated issues of Indian law, with devastating consequences. See the discussion of South Dakota v. Bourland, 113 S. Ct. 2309 (1993), *infra* at text accompanying notes 323-29.

143. The surplus lands program is discussed *supra* in part II.A.2.

144. General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389-90 (1887):

> That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress . . . .

lost to non-Indian ownership during the allotment era.[145] Although the Indian Reorganization Act ended the process and authorized the Secretary to restore the remaining surplus lands to tribal ownership,[146] millions of acres taken for homesteading during the allotment era remain in non-Indian fee status today.

A generation after the tribes lost ownership of the surplus lands to non-Indian homesteaders, the Supreme Court took up the issue of whether the tribes had also lost territorial sovereignty. Over the next two decades, the Court developed an obscure and essentially ad hoc approach to determining whether individual surplus lands acts terminated the reservation status of the surplus lands.

The early reservation disestablishment cases appeared to establish a relatively workable test based largely on the language and intent of the particular surplus lands act. In the first of the disestablishment cases, *Seymour v. Superintendent of Washington State Penitentiary*,[147] the Court distinguished between surplus lands acts that merely opened the reservation to non-Indian ownership of parcels of land, and those acts that severed tracts from the reservation and then opened the severed lands to settlers.[148] Fundamentally, the question was whether the surplus lands had been ceded outright to the United States, or whether those lands had merely been made available to those who wished to settle in Indian country.

Initially, the Court grounded the distinction in the language of the surplus lands acts themselves. Where Congress used language expressly terminating reservation status,[149] particularly if it coupled the terminating language with

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145. Approximately 60 million acres were taken during the allotment years as surplus lands. COHEN'S HANDBOOK, *supra* note 18, at 138.

146. Indian Reorganization Act, ch. 576, § 3, 48 Stat. 984 (codified as amended at 25 U.S.C. § 463 (1988)).

147. 368 U.S. 351 (1962). It may be significant that *Seymour* was decided as the ravages of the termination era were becoming evident and public policy was beginning to shift again to protecting tribal autonomy. A Court faced with immediate evidence of the failure of an assimilationist policy was unlikely to strain to give effect to a similar policy from an earlier era. A contemporaneous commentator, however, posited that the outcome in *Seymour* was consistent with assimilation because "the Indians who remain ignorant of the modern world, living on the reservations and therefore apart from that world, do still require protection." The "mantle of federal protection" should not be entirely discarded until the assimilation process is "relatively complete." Osborne M. Reynolds, Note, *Indians—Reservations—Federal Jurisdiction Ended Only by Express Provision of Congress*, 5 ARIZ. L. REV. 131, 135 (1963-64).

148. *Seymour*, 368 U.S. 351. This distinction did not originate with the Court. The Interior Department drew the same line in determining which surplus lands it was authorized to restore to tribal ownership under § 3 of the Indian Reorganization Act. 54 Interior Dec. 559, 560 (1934).

149. In *Seymour*, the Court referred to language in the surplus lands act for the North Half of the Colville Reservation that the land was to be "vacated and restored to the public domain" as sufficient to show disestablishment. 368 U.S. at 354. Other examples of disestablishment language subsequently cited by the Court included "the Smith River reservation is hereby discontinued" and "the reservation lines of the said . . . Indian reservations be, and the same are hereby, abolished." Mattz v. Arnett, 412 U.S. 481,

full payment to the tribe of a sum certain for the ceded lands, the combination created "an almost insurmountable presumption" of reservation disestablishment.[150] Essentially, the Court viewed this type of surplus lands act as no different than any land cession prior to the allotment era.[151] By contrast, if Congress merely opened the existing reservation lands to settlement, with the proceeds of individual sales deposited in the Treasury for the benefit of the tribe, no disestablishment occurred.[152]

Where the language of the surplus lands act did not so expressly provide for termination of the reservation status, the Court turned to the intent of both Congress and the tribes as indicated by tribal "consent" to the loss of the lands. In *DeCoteau v. District County Court*, the Court found that the language of the Sisseton and Wahpeton surplus lands act was ambiguous.[153] Unlike surplus lands acts which unambiguously "abolished" or "discontinued" the reservation status of the lands or expressly "vacated and restored [the lands] to the public domain,"[154] the Sisseton-Wahpeton act ratified an agreement by which the tribes agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands" of the reservation.[155] While the act clearly divested the tribes of title to the unallotted lands, the language did not expressly "abolish" or "discontinue" or "vacate" the reservation itself.[156] Nonetheless, the Court found that congressional intent to disestablish the

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504 n.22 (1973).

150. Solem v. Bartlett, 465 U.S. 463, 470 (1984); *see also* DeCoteau v. District County Court, 420 U.S. 425, 445-46 (1975). *But see* Campbell, *supra* note 67, at 73 (arguing that distinctions among surplus lands acts make "little sense" because the acts were "designed only to accomplish a transfer of lands to individuals").

151. *But see* Richard A. Smith, *New Town et al.: A Reply*, 18 S.D. L. REV. 327, 328-30 (1973) (arguing that even the cession-type surplus lands acts are at most a hybrid of acts opening Indian lands to settlement and the "cession and removal" acts or treaties of the pre-allotment era).

152. *See Mattz*, 412 U.S. at 496-97 (1973). The Klamath River surplus lands act, which the Court held did not disestablish the reservation, provided that the lands "are hereby declared to be subject to settlement, entry, and purchase" and that the "proceeds arising from the sale of said lands shall constitute a fund to be used ... for the maintenance and education of the Indians ...." *See also Seymour*, 368 U.S. at 355-56.

153. 420 U.S. 425 (1975).

154. *Mattz*, 412 U.S. at 504 n.22.

155. *DeCoteau*, 420 U.S. at 445.

156. In fact, "[t]here is not a word to suggest that the boundaries of the reservation were altered." *Id.* at 461 (Douglas, J., dissenting). Professor Frickey calls the argument based on cession language a "non sequitur," because cession may divest the tribe of title, but says nothing about divesting the tribe of jurisdiction. Frickey, *supra* note 117, at 1149-50. Professor Clinton observes that it was "at best misguided and at worst an outright misuse of Native American legal history" to use congressional intent regarding land titles to infer intent regarding the disestablishment of tribal jurisdiction. Robert N. Clinton, *The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation*, 28 ARIZ. L. REV. 29, 42 (1986).

reservation could be found "unmistakably" both on the face of the surplus lands act and from the surrounding circumstances and legislative history.[157]

Untroubled by the lack of plain language terminating the reservation,[158] the Court discovered disestablishment in the factors constituting the "surrounding circumstances and legislative history."[159] First, the Court found it significant that the tribe had consented, in negotiations leading to an agreement that was then ratified by Congress, to convey "all" its interest to the government for a sum certain: in other words, that the tribe ceded the land in exchange for payment in full from the government.[160] Second, the Court noted that the language of the Sisseton-Wahpeton act paralleled that of other contemporaneous acts which all parties agreed terminated portions of the affected reservations.[161] Third, the sponsors of the ratifying legislation had "stated repeatedly" that the Sisseton-Wahpeton lands would

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157. *DeCoteau*, 420 U.S. at 444-45. The idea that Congress's intent to diminish a particular reservation could "be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history" was first introduced by the Court in *Mattz*. 412 U.S. at 505. In *Mattz*, however, the statement was essentially dictum. The Court found no clear language of termination in the Klamath River surplus lands act of 1892, and therefore refused to "infer an intent to terminate the reservation." *Id.* at 504. The Court then noted that its conclusion, already arrived at on the basis of the statutory language itself, was "reinforced" by the circumstances that both Congress and the Interior Department continued to treat the Klamath River Reservation as a reservation. *Id.* at 505. The Court's decision in *DeCoteau* two years later represented the first time the Court ignored the lack of express statutory language in favor of inferring intent from extraneous factors.

158. As noted, the test articulated in dictum in *Mattz* called for congressional intent to disestablish to be "expressed on the face of the Act." 412 U.S. at 505 (quoted in *DeCoteau*, 420 U.S. at 444). The Court in *DeCoteau* found the Sisseton-Wahpeton act language "precisely suited" to termination, but did so based *not* on the face of that act but on the surrounding circumstance of the similarity in language between the Sisseton-Wahpeton act and other acts which the parties apparently agreed resulted in disestablishment. 420 U.S. at 445.

159. *Id.* at 445.

160. *Id.* at 445, 448.

161. *Id.* at 439. The language of the contemporaneous acts was virtually identical to the Sisseton-Wahpeton act, providing that the tribes would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to" the lands. *Id.* at n.22. In each of the other cases, however, the tribe was specifically ceding a described tract of land, a particular portion of the reservation. *Id.* at 439. By contrast, the Sisseton-Wahpeton were selling only the unallotted lands of their reservation remaining after allotment to members of the tribe. *Id.* at n.22. If a tribe cedes all title to a tract of land, the presumption arguably may be that the tract is no longer part of the reservation. But the cession of title to particular scattered parcels within the reservation—despite the identity of language—should carry no similar presumption. *See id.* at 466 (Douglas, J., dissenting). Congress itself has provided that Indian country encompasses all lands within reservation boundaries, "notwithstanding the issuance of any patent," 18 U.S.C. § 1151, in an attempt to avoid the checkerboard jurisdiction condemned by the Court in *Seymour*, 368 U.S. at 358. The *DeCoteau* outcome, however, creates that checkerboard because the Sisseton-Wahpeton allotments would remain Indian country under 18 U.S.C. § 1151(c). In light of § 1151 and the policies and practicalities opposing checkerboarding, the mere cession of unallotted parcels—as opposed to the outright cession of portions of the reservation itself—should not diminish the status of the lands as Indian country.

be returned to the public domain.[162] Hitching the language of the act to the statements of the congressional sponsors, the Court held that the act disestablished the entire Sisseton-Wahpeton Reservation.

The decision in *DeCoteau* represented a significant and troubling departure from the Court's previous disestablishment analysis.[163] Most disturbing was the retreat from the express language of the act. In both of its prior disestablishment cases, the Court had based its ultimate holding squarely on the language of the act. In neither case did the act expressly authorize termination of the surplus lands from the reservation, and the Court consequently refused to infer any congressional intent to do what the act did not provide.[164] In *DeCoteau*, by contrast, the Court said it found an unmistakable intent to terminate on the face of the act, but its analysis relied solely on the circumstances surrounding the act's passage.[165] The language of the Sisseton-Wahpeton act was relevant only in passing. Moreover, to the extent that the language of the act at issue in *DeCoteau* was ambiguous, the canons of construction[166] would call for the language to be interpreted to the benefit of the tribe. Given that the act did not expressly terminate the

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162. *Decoteau*, 420 U.S. at 446. Express language in a surplus lands act providing that the lands were to be "vacated and restored to the public domain" would constitute disestablishment of the restored lands. *See Seymour*, 368 U.S. at 354. In *DeCoteau*, however, the "public domain" language was found not in the act itself, but only in remarks by the sponsors of the legislation. 420 U.S. at 441. There was no evidence of similar language in the negotiations leading to the agreement, and consequently no evidence that the tribe understood that the ceded lands would be deleted from the reservation.

As a side note, the notion that tribal lands could be "restored" or returned to the public domain is one of those fictions that permeate Indian law. Tribal lands could only be restored to the public domain if they had previously been a part of the public domain, and they had not. (At least, reservations created by treaties or statutorily-ratified agreements had not; executive order reservations were created out of the public domain. *See* COHEN'S HANDBOOK, *supra* note 18, at 127.) Public domain lands are generally defined as those which are open to sale or disposal under the laws of the United States. *See* Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 821 (1993). Lands could only be open to disposal if Congress had first extinguished Indian title. But most reservations represented exactly the opposite: congressional recognition of Indian title, transforming that title into a recognized property right. *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). In other words, reservations created by treaty or agreement passed from Indian title to recognized title status, without ever becoming part of the public domain.

163. As one commentator noted: "*DeCoteau* has clearly shown that to determine the effect a particular statute had on reservation boundaries, the courts must not rely on general principles of Indian law in ascertaining congressional intent." James M. Bekken, Comment, *Indians—Reservations—Jurisdictional Effect of Surplus Land Statute Upon Traditional Boundaries of an Indian Reservation*, 52 N.D. L. REV. 411, 418 (1975).

164. "Congress has used clear language of express termination when that result is desired." *Mattz*, 412 U.S. at 504 n.22.

165. 420 U.S. at 445-49.

166. The Court did articulate the canons in *DeCoteau*. 420 U.S. at 444. The case thus represents one of the group of decisions in which the Court recognizes that the canons apply and reproduces them in the opinion, but then fails to employ them in reaching its conclusions.

reservation, that Congress is capable of making its intent to terminate plain when it wishes to do so,[167] and that disestablishment is detrimental to the tribe, application of the canons should have led the Court to determine that the act did not terminate the Sisseton-Wahpeton Reservation.

As troubling as the analysis in *Decoteau* was, however, the subsequent cases ultimately proved even more troubling for tribes subject to the surplus lands program. Within two years of its decision in *DeCoteau*, the Court declared that many of the factors it found relevant to diminishment in that case—a sum-certain payment for the ceded lands and tribal consent to the cession as shown through a negotiated agreement preceding the surplus lands act—were in fact not dispositive. In *Rosebud Sioux Tribe v. Kneip*,[168] the Court stated that the only truly relevant factor in its prior cases had been congressional intent.[169] Circumstances such as tribal consent and provision for a sum-certain payment were mere aids to the determination of congressional intent, but were not in themselves dispositive one way or the other.

This reformulation of the prior case law was necessary to the Court's chosen resolution of *Rosebud Sioux*, however, because the Court's previous decisions had rested on factors not present in the Rosebud Sioux situation. In *Seymour*[170] and *Mattz v. Arnett*,[171] the cases in which no disestablishment was found, the Court relied on the facts of unilateral congressional action, the lack of any sum-certain payment, and the lack of any express language of cession to hold that the reservations had not been diminished. In the first of the cases to find disestablishment, *DeCoteau*, the Court distinguished *Seymour* and *Mattz* by pointing to tribal "consent" to the cession, to the presence of a sum-certain payment, and to language which was at least arguably language of cession.[172] In *Rosebud Sioux*, only the last factor was present: the Rosebud surplus lands acts[173] contained

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167. For a list of examples see *Mattz*, 412 U.S. at 504 n.22.

168. 430 U.S. 584 (1977).

169. *Id.* at 598 n.20.

170. 368 U.S. 351 (1962).

171. 412 U.S. 481 (1973).

172. 420 U.S. at 425.

173. The case involved three surplus lands acts for the Rosebud Reservation enacted between 1904 and 1910, each dealing with the surplus lands in different counties of South Dakota. *See* 430 U.S. at 586. The Court focused its analysis on the 1904 Act, noting that "[n]one of the parties really disputes that the intent of the three Acts was the same." *Id.* at 606. The intent may arguably have been the same, but the language of the latter two acts was substantially different. Neither the 1907 nor the 1910 Act contained any express language of cession. Instead, those acts merely authorized the Secretary of the Interior to "sell and dispose of" the unallotted lands in certain counties. *See id.* at 612-13. Pointing out the disparity to the Court may ultimately have made no difference, however, because the Court refused to accept a similar argument nearly two decades later in Hagen v. Utah, 114 S. Ct. 958 (1994). *See infra* text

language of cession virtually identical to the language at issue in *DeCoteau*.[174] The Rosebud acts, however, did not provide for a sum certain payment for the ceded lands, but rather called for the United States to act only as a trustee with regard to disposal of the land and receipt of payment.[175] In addition, the Rosebud acts did not merely ratify negotiated agreements reached with the tribe.[176] The 1904 Rosebud Act, instead, was "the first attempt under the *Lone Wolf* decision to steal Indian lands,"[177] enacted rapidly by Congress without tribal consent.[178]

Nonetheless, the Court found that the Rosebud Sioux surplus lands acts disestablished the reservation. Ignoring the absence of other relevant factors from its prior cases, the Court focused instead on the language of cession[179] and snippets of legislative history.[180] Moreover, the Court relied upon a

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accompanying notes 202-14.

174. The 1904 act called for the tribe to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted" in Gregory County, South Dakota. Act of Apr. 23, 1904, 33 Stat. 254, 256 (quoted in *Rosebud Sioux*, 430 U.S. at 597). As in *DeCoteau*, there was no express language terminating or abolishing the reservation, although that factor no longer appeared to concern the Court. *See Rosebud Sioux*, 430 U.S. at 618-19 (Marshall, J., dissenting).

175. *Rosebud Sioux*, 430 U.S. at 609. The lack of a sum certain payment was a deliberate attempt to avoid an appropriation of compensation for the lands taken. II PRUCHA, *supra* note 27, at 867. In prior cases, the Court found it crucial whether Congress had paid outright for the lands ceded by the tribes. An exchange of land for payment is certainly more indicative of an intent to terminate the lands from the reservation than is an exchange of lands for a promise to pass compensation along to the tribes if and when the lands are actually sold.

176. The tribe and the United States had negotiated an agreement in 1901 in which the tribe agreed to sell 416,000 acres for $2.50 an acre. *Rosebud Sioux*, 430 U.S. at 591; HOXIE, *supra* note 38, at 156. Congress refused to ratify that agreement, however, because it did not want to pay a sum certain for the surplus lands. 38 Cong. Rec. 1423 (1904) (remarks of Rep. Burke) (quoted in *Rosebud Sioux*, 430 U.S. at 591). Moreover, although Congress spoke in the 1904 Act of "ratifying" the 1901 agreement with the tribe, it made substantial and unilateral changes to the agreement before enacting it into law. *See Rosebud Sioux*, 430 U.S. at 619 (Marshall, J., dissenting).

177. HOXIE, *supra* note 38, at 157 (quoting Herbert Welsh, founder of the Indian Rights Association). In Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), the Court held that plenary power authorized Congress to unilaterally take surplus lands in violation of provisions of both treaties and the General Allotment Act requiring tribal consent. See the discussion of the effects of *Lone Wolf* on Congress, *supra* at text accompanying notes 65-70.

178. *See generally* II PRUCHA, *supra* note 27, at 867-69; HOXIE, *supra* note 38, at 156-57.

179. The Court noted that cession language was present not only in the surplus lands act of 1904, but also in the presidential Rosebud Proclamation of May 13, 1904, 33 Stat. 2354, which declared the lands open to settlement. *Rosebud Sioux*, 430 U.S. at 602. The Proclamation, however, simply mirrored the language of the act and did not expressly abolish, vacate, or terminate the Rosebud Reservation.

Another factor for the Court was that the tribe "was eventually paid for the land." *Id.* at 598. The Court did not explain the exact significance of this statement, but it appears to mean that the Court sees no difference between cessions of land for a sum certain (as in *DeCoteau*) and opening the land to settlement with the government acting as paymaster, so long as the tribe ultimately received compensation for the loss of title.

180. As the dissent noted, the Court found only five quotations relevant to the disestablishment issue,

damaging new aspect of the disestablishment analysis. Not content with switching the focus from the need for a negotiated cession of lands, the Court gave significant weight to the so-called "subsequent jurisdictional history" of the surplus lands.[181] Acknowledging that the subsequent jurisdictional history was "not entirely clear,"[182] the Court nonetheless found that state assumption of jurisdiction over the opened lands "not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges."[183] Without discussing whether the state's assumption of jurisdiction was proper or even legal when it was first asserted, the Court retroactively sanctioned state jurisdiction by finding that the surplus lands had been disestablished from the Rosebud Sioux Reservation.

In its next foray into the disestablishment issue, the Court attempted to organize the chaos it had created in *Rosebud Sioux*. In *Solem v. Bartlett*,[184] the Court opined that its prior disestablishment cases "have established a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries."[185] The Court then discussed a three-part approach. The first prong is the language of the act: express termination of the reservation or "[e]xplicit reference to cession," particularly if the ceded lands are compensated by a sum-certain payment, demonstrates "an almost insurmountable presumption" that Congress intended to terminate the surplus lands from the reservation.[186] Second, even in the absence of explicit language and a sum-

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only two of which pertained to the 1904 Act on which the Court based its analysis of congressional intent. *Rosebud Sioux*, 430 U.S. at 627 (Marshall, J., dissenting); *see id.* at 595-96 (pertaining to the 1904 Act); *id.* at 607-08 (pertaining to the 1907 Act); *id.* at 611-12 (pertaining to the 1910 Act). The remarks relative to the 1904 Act, however, merely refer to the cession of the surplus lands and the fact that the lands will be opened and paid for as they are homesteaded. There is, as in the Act itself, no express reference to abolishing or terminating the reservation.

181. *Rosebud Sioux*, 430 U.S. at 603-05. The idea of "jurisdictional history subsequent to" the surplus lands acts first surfaced in *DeCoteau*, where the Court noted that state jurisdiction over the non-Indian lands "went virtually unquestioned" from the time of cession to the 1960s, but that during the 1960s the Sisseton-Wahpeton Tribe asserted jurisdiction throughout its original reservation boundaries. *DeCoteau*, 420 U.S. at 442-44. Despite that recitation, the *DeCoteau* Court does not appear to have relied in any way on the jurisdictional history in holding that the Sisseton-Wahpeton act disestablished the reservation. The Court, rather, depended upon the act's language of cession, the payment of a sum certain, and the "consent" of the tribe to the loss of the lands.

182. *Rosebud Sioux*, 430 U.S. at 603.

183. *Id.* at 605.

184. 465 U.S. 463 (1984).

185. *Id.* at 470. The Court's opinion was not shared by others.

186. *Id.* at 470-71.

certain payment, the legislative history and surrounding circumstances may support disestablishment.[187] And third, the Court determined that the subsequent jurisdictional history of the surplus lands could show "de facto" disestablishment of the reservation.[188]

When the Court applied this analysis to the Cheyenne River Act of 1908,[189] it handed the tribes their only victory on the disestablishment issue in the past two decades. The language of the Cheyenne River Act authorized the Secretary of the Interior to "sell and dispose" of the surplus lands and deposit the proceeds in the Treasury in trust for the tribe; nowhere in the act did Congress use any language of cession.[190] In addition, the surrounding circumstances did not support disestablishment: the act did not arise from a negotiated agreement representing any tribal consent to loss of the surplus lands[191] and the legislative history contained at most "a few isolated and ambiguous phrases" concerning congressional intent to disestablish the reservation.[192] Finally, the Court found the subsequent jurisdictional history of the surplus lands "so rife with contradictions and inconsistencies" that it could not constitute de facto disestablishment.[193] Both the federal government and the state apparently exercised some jurisdiction over the surplus lands, the tribal headquarters was located in the opened area, and the majority of the tribal members lived in that area.[194] Based on this analysis, the Court found that the Cheyenne River Act met none of the conditions for disestablishing the reservation. Instead, it had merely opened the surplus lands to non-Indian settlement, leaving the reservation boundaries intact.

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187. *Id.* at 471.

188. *Id.*

189. Ch. 218, 35 Stat. 460.

190. *Id; see Solem*, 465 U.S. at 472-73.

191. *Solem*, 465 U.S. at 476-77.

192. *Id.* at 478. Oddly enough, the "isolated and ambiguous" phrases cited by the Court in *Solem*—references to a "reduced reservation" and to the "reservations as diminished"—are arguably more probative of congressional intent to disestablish than the vague references to cession that the Court in *Rosebud Sioux* was willing to construe as clear evidence of an intent to terminate the surplus lands.

193. *Id.*

194. *Id.* at 479-80. The extent of tribal versus non-Indian land ownership and population was crucial, foreshadowing the importance of that issue in the regulatory jurisdiction cases. *See infra* part V. In *Rosebud Sioux*, the Court noted that the opened area "is over 90% non-Indian, both in population and in land use." 430 U.S. at 605. In *Solem*, by contrast, the population of the opened area was about half tribal members and half non-Indians. 465 U.S. at 480. Enough Indians were left in the area that the Court could conclude that the area retained its "Indian character." *Id.* That phrase, coined by Justice Marshall as author of the unanimous *Solem* decision, was revived in the zoning case of Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989). The dissent in *Brendale*, in which Justice Marshall joined, then condemned the "Indian character" analysis as stereotypical and patronizing. *Id.* at 464-65 (Blackmun, J., dissenting).

The Court's only subsequent use of the *Solem* analysis, however, resulted in the opposite conclusion. In *Hagen v. Utah*,[195] the Court determined that a series of acts between 1902 and 1905, opening surplus lands on the Uintah Reservation, terminated those lands from the reservation. As in *Solem*, the Court purported to rely on the language of the surplus lands acts, the surrounding circumstances and legislative history, and the "subsequent demographics" of the opened area.[196]

For the first part of its analysis, the *Hagen* Court focused on what it termed the "operative language" of the surplus lands acts: that is, the language of the provision which actually opened the lands.[197] In doing so, however, the Court ignored the language of the act and the presidential proclamation which actually did open the surplus lands of the Uintah Reservation, and instead found termination language in a 1902 act which first introduced the idea of allotting and homesteading the reservation. In 1902, Congress provided that if the tribes of the Uintah Reservation consented, the reservation would be allotted and the surplus lands "restored to the public domain" and opened to homesteading.[198] In *Seymour v. Superintendent of Washington State Penitentiary*, the Court held that similar language—that the surplus lands be "vacated and restored to the public domain"—would terminate the surplus lands from the reservation.[199] The Uintah Act of 1902, however, unlike the act described in *Seymour*, did not expressly "vacate" the reservation status of the lands.[200] As the dissent in *Hagen* noted, merely equating surplus lands with the public domain is at best an ambiguous reference, one not inconsistent with the continued status of the surplus lands as reservation territory.[201]

Moreover, even if the 1902 Uintah Act could be interpreted as terminating the surplus lands, the 1902 Act was never put into effect. Instead, following the 1903 decision in *Lone Wolf*, Congress directed the Secretary of the Interior to allot the lands unilaterally if the tribes continued to refuse to consent, and extended the time for opening the surplus lands as provided for

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195. 114 S. Ct. 958 (1994). *Hagen* was decided during Justice Ginsburg's first term on the Court. Unfortunately, she joined the majority opinion in favor of disestablishment, and thus is likely to help carry on the legacy of allotment. The retirement of Justice Blackmun appears to leave only the surprise of Justice Souter, who joined Blackmun in dissent in *Hagen* and in South Dakota v. Bourland, 113 S. Ct. 2309, 2321 (1993) (discussed *infra* at text accompanying notes 317-38), to support tribal territorial sovereignty.

196. 114 S. Ct. at 965.

197. *Id.* at 966-67.

198. Act of May 27, 1902, ch. 888, 32 Stat. 263, discussed in *Hagen*, 114 S. Ct. at 961-62. The tribes did not consent. *See Hagen*, 114 S. Ct. at 963.

199. 368 U.S. 351, 354 (1963).

200. Ch. 888, 32 Stat. 263.

201. 114 S. Ct. at 974-75 (Blackmun, J., dissenting).

in the 1902 Act.[202] The Uintah surplus lands were actually opened in 1905. By statute, Congress again deferred the opening until September of that year, and provided that the surplus lands:

> shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof.[203]

The 1905 Act also provided for payment in accordance with the 1902 Act.[204] The 1902 Act had not provided for a sum certain payment for the lands, but rather provided that settlers would pay for the lands they homesteaded, with the proceeds held in trust for the tribes.[205] In July 1905, President Roosevelt proclaimed the opening of the Uintah surplus lands "under the general provisions of the homestead and townsite laws of the United States."[206] The 1905 Uintah Act and the proclamation thus mirrored the language of the Klamath River Act, which the Court held in *Mattz v. Arnett* did not disestablish the reservation.[207]

Nonetheless, the Court focused solely on the language of the 1902 Act. It bypassed the pesky problem of the 1905 Act's plain language by holding that the 1905 Act was "tied together" with the 1902 Act because of the provision regarding the fate of the proceeds.[208] Thus, the Court concluded, Congress in 1905 "clearly viewed the 1902 statute as the basic legislation upon which subsequent Acts were built."[209] Moreover, the Court noted, the 1905 Act did not impliedly repeal the 1902 Act because the provisions

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202. Act of March 3, 1903, ch. 994, 32 Stat. 998, discussed in *Hagen*, 114 S. Ct. at 962. The following year, Congress again deferred the opening of the surplus lands. Act of April 21, 1904, ch. 1402, 33 Stat. 207.

203. Act of March 3, 1905, ch. 1479, 33 Stat. 1069 (quoted in *Hagen*, 114 S. Ct. at 963).

204. *Id.*

205. *See Hagen*, 114 S. Ct. at 961-62 & n.1.

206. 34 Stat. 3119-20 (quoted in *Hagen*, 114 S. Ct. at 963-64).

207. 412 U.S. 481, 495 (1973). The Klamath River Act declared the surplus lands "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights" and provided that the proceeds would be held in trust for the tribe. Act of June 17, 1892, ch. 120, 27 Stat. 52.

208. *Hagen*, 114 S. Ct. at 967. The Court's need to "tie together" two different acts in order to effectuate the allotment policy is reminiscent of its similar approach in County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992), in which the Court found it necessary to fold the language of § 6 of the General Allotment Act into its interpretation of § 5, rather than interpret § 5 according to its plain language. *See supra* text accompanying notes 114-16. In both cases, had the Court looked only to the language of the act or provision relevant to the issue at hand, it should have ruled against continuing the legacy of allotment to the detriment of the tribes.

209. *Hagen*, 114 S. Ct. at 967-68.

regarding opening of the surplus lands were "not inconsistent" with those of the earlier act.[210]

Contemporaneous historical evidence, the Court claimed, supported its reading. One of the few surrounding circumstances cited by the Court was a statement by Indian Inspector James McLaughlin, sent to negotiate for the tribes' consent to allotment in 1903. McLaughlin told the tribes that if they consented to the government's wishes, "after next year there will be no outside boundary line to this reservation."[211] Even if this constitutes clear evidence of an intent to disestablish the surplus lands, it refers only to intent under the 1902 Act; the 1905 Act, by contrast, changed the terms and conditions of the disposition of the surplus lands. The Court also referenced, oddly enough, the House version of the 1905 Act, which would have restored the surplus lands to the public domain.[212] Because the Senate version that was ultimately enacted did not contain public domain language, the simple inference is that Congress did not intend by 1905 to restore the surplus lands to the public domain. The Court, however, drew a different conclusion. Admitting that "we have no way of knowing for sure" why Congress chose to offer entry under the homestead laws rather than restore the lands to the public domain, the Court nonetheless felt that it "seems likely" that Congress merely intended to limit land speculation, an objective "not inconsistent with the restoration of the unallotted lands to the public domain."[213] Thus, based on no evidence other than wishful thinking,[214] the Court ignored the plain language of the 1905 Act and instead read that Act as somehow incorporating the language of the 1902 Act.

Finally, the Court found that the subsequent history of the opened area supported de facto disestablishment.[215] The population of the former surplus lands was some 85 percent non-Indian, with the population of the largest city more than 90 percent non-Indian.[216] Tribal headquarters were located on trust lands, not in the opened area, and the state of Utah had generally assumed jurisdiction over the area.[217] The modern demographics

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210. *Id.* at 968. If one act (1905) did not terminate the lands from the reservation and one act (1902) arguably did, the inconsistency seems evident. Moreover, the Court has used the "not inconsistent" approach in other recent cases in the same way: as a means of finding that earlier detrimental language survives passage of later legislation that is more protective of tribal interests. *See supra* note 135 (discussing *County of Yakima*, 502 U.S. 251 (1992)).

211. *Hagen*, 114 S. Ct. at 968.

212. *Id.* at 969.

213. *Id.* Once again, the Court reverted to the "not inconsistent with" approach. *See supra* note 210.

214. As the dissent noted, the Court's approach does not explain why Congress deliberately chose *not* to include the public domain language in the 1905 Act. *Id.* at 979 (Blackmun, J., dissenting).

215. *Id.* at 970.

216. *Id.*

217. The state did so between 1905 when the surplus lands were opened to settlement and 1985, when

of the surplus lands, along with the circumstances surrounding passage of the surplus lands acts, the Court held, bolstered its decision that the acts disestablished one-fifth of the Uintah Reservation.[218]

The Court's reading of the 1905 Act and its history is one of the more blatant recent examples of the Court's wilful disregard of the canons of construction. If statutes limiting tribal rights are to be construed narrowly in favor of the tribes, then basing a decision which divests the tribes of their territory on the Court's inability to ascertain exact congressional intent is worse than disingenuous. It represents what can only be described as a deliberate decision to further the policies of the allotment era at the expense of the tribes and the current government-to-government relationship between the tribes and the federal government.

The ultimate aim of the allotment policy was the eventual break up of the reservations. But in order to allow the gradual assimilation of Indians, the allotment policy also contemplated a relatively lengthy process. Lands were allotted with twenty-five year trust restrictions, and the surplus land was opened so that new lands were available to settlers and so that non-Indian neighbors were available to allottees as exemplars. Under these conditions, Congress assumed that over time the reservations would simply disappear. As a result, the individual surplus lands acts were seldom clear as to whether the surplus lands were severed from the boundaries of the reservations.[219] In the disestablishment cases, then, the central issue has been when a given surplus lands act was sufficiently clear to terminate the opened lands from the reservation.

Throughout its disestablishment cases, the Court has concentrated on congressional intent to terminate reservation status. Arguably, this standard would have been a reasonable approach to the surplus lands acts if the Court had stuck with its original analysis in *Seymour*, focusing on the language of

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the Tenth Circuit held that the Uintah Reservation had not been disestablished. Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986). Apparently the decade between the *Ute Tribe* decision and *Hagen* did not constitute a part of the jurisdictional history of the opened area. Moreover, there was no indication in the *Hagen* opinion that the lack of state jurisdiction during that decade led to the parade of horribles apparently envisioned by the Court if the surplus lands were found to still be within the reservation. *See Hagen*, 114 S. Ct. at 970 (concerned that a finding of no disestablishment "would seriously disrupt the justifiable expectations of the [non-Indian] people living in the area," but offering no evidence that it had done so); *see also Rosebud Sioux*, 430 U.S. at 605.

218. The reservation was originally 2 million acres, some 400,000 of which were declared surplus lands. *Hagen*, 114 S. Ct. at 970.

219. *See Rosebud Sioux*, 430 U.S. at 629 (Marshall, J., dissenting). Nonetheless, Congress knew how to be express about disestablishment, and where the language of the particular act was clear, the Court was willing to find disestablishment of the surplus lands. *See* Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973).

the act itself.[220] Thus, reservation disestablishment would perhaps be a reasonable determination if the language of the act expressly or plainly showed that Congress intended to terminate the reservation status of the land and return the land to the public domain, and Congress carried out that intent by paying the tribe a sum certain for the territory terminated as reservation lands, and the act ratified a negotiated agreement between the tribe and the federal government.[221] But the Court faltered in its application of congressional intent. First it moved away from the requirement that Congress make its intent to disestablish plain on the face of the act, and then it introduced the legal niceties of the "surrounding circumstances" standard and the offensive racism of whether the surplus lands retained their Indian character by not becoming too white.[222]

In implementing that approach to the disestablishment question, the Court has given effect not to Congress's intent in the surplus lands acts, but to the general intent of the repudiated allotment policy.[223] Only where the surplus lands act contains *no* language that could arguably be construed as language of either cession or termination has the Court, in recent years, been willing to find an absence of congressional intent to disestablish.[224] Moreover, the Court is adamant about clinging to that approach even when it concedes that it has "no way of knowing for sure" what Congress intended in any given act.[225] Not only is that approach fundamentally flawed under the canons of construction, but more destructively it is designed to further the policies of the allotment era even if the particular surplus lands act did not contemplate an end to the reservation status of the opened lands. The lack of clear congressional intent, the repudiation of the allotment policy, and the modern policy of encouraging tribal governmental status all appear irrelevant to the Court's disestablishment analysis.

As in its interpretation of the General Allotment Act in *County of Yakima*,[226] the Court in the disestablishment cases could have chosen a reasonable interpretation of the surplus lands acts that would have taken account of those factors. Had it focused solely on congressional intent as

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220. *See Seymour*, 368 U.S. at 354-56.

221. Professor Skibine calls this the "steal it fair and square" analysis. Alex Tallchief Skibine, *Removing Race Sensitive Issues from the Political Forum: Or Using the Judiciary to Implicitly Take Someone's Country*, 20 J. CONTEMP. L. 1, 7 (1994).

222. *See Hagen*, 114 S. Ct. at 958. The Court has generally used these last two factors to support the conclusion the Court has already reached based on the language of the surplus lands act at issue in any given case. *See id.*

223. *See* Skibine, *supra* note 221, at 7-8.

224. *See Solem*, 465 U.S. at 472-73.

225. *Hagen*, 114 S. Ct. at 969.

226. *See supra* part III.

expressed through the plain language of the particular surplus lands act, it could have given effect both to the express intent of Congress and to tribal territorial sovereignty. Instead, the Court chose to further the legacy of allotment by straining to find whenever remotely possible that the surplus lands acts terminated the reservation status of those lands, and therefore terminated tribal sovereignty over the disestablished lands.

V. ALLOTMENT AND SOVEREIGNTY: THE REGULATORY JURISDICTION CASES

The reservation disestablishment cases discussed in the previous part address the legacy of the allotment policy with regard to the territory encompassed today by reservation borders. But even within existing and recognized reservation boundaries, the modern legacy of allotment has divested tribes of sovereign control over the territory. In particular, the Court has used the effects of allotment to wrest from tribes sovereign authority over non-Indian-owned fee lands within tribal territories.

One of the primary tenets of sovereignty is the concept that within its territorial limits, the sovereign's power is exclusive. Since the foundations of federal Indian law and the denomination of tribes as "domestic dependent nations,"[227] however, tribal sovereign powers have been subject to federal control. Until the 1880s, federal authority in Indian affairs was largely confined to the exercise of authority over relations between the tribes as sovereigns and the American people.[228] Aside from those powers of external sovereignty, powers the Court had declared inconsistent with the dependent status of the tribes, tribal sovereign authority within tribal territory remained exclusive. In the 1880s, however, Congress and the Supreme Court made significant inroads into this exclusivity.

Those nineteenth century incursions primarily focused on the application of criminal laws in the Indian country. In 1885, Congress asserted its first direct control over the internal affairs of the tribes. With passage of the Major Crimes Act,[229] the federal government for the first time exercised

227. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

228. The federal government, accordingly, had exclusive power to control the disposition of Indian lands and the exclusive authority to enter into relations with the tribes. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

229. 18 U.S.C. § 1153 (1988 & Supp. 1994). In the decade leading to the allotment era, federal officials favoring assimilation had proposed federal criminal jurisdiction over Indians along with the allotment of tribal lands in severalty. *See* 1876 COMMISSIONER OF INDIAN AFF. ANN REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 20, at 147, 150. The immediate impetus for the Major Crimes Act, however, was the decision in *Ex parte* Crow Dog, 109 U.S. 556, 571-72 (1883),

authority to determine the relations among tribal members within tribal territory. In addition to that intrusion into tribal sovereignty, the Supreme Court held in the 1881 case of *United States v. McBratney*[230] that federal courts were without jurisdiction to prosecute crimes between non-Indians occurring in Indian country. While *McBratney* itself determined only that the federal courts had no jurisdiction, it has come to stand for the proposition that states, by virtue of their admission into the union, acquired criminal jurisdiction over crimes involving only non-Indians.[231] Crimes not involving Indians, the Court determined, implicated no tribal sovereign interests requiring federal or tribal jurisdiction.[232]

Despite these early inroads on tribal authority to govern all conduct within tribal territory, arguably the most serious and far-reaching curtailment of tribal power occurred in 1978 with the decision in *Oliphant v. Suquamish Indian Tribe*.[233] In *Oliphant*, the Court resurrected the notion that tribes were, upon their incorporation within the United States,[234] impliedly

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in which the Court held that federal courts were without jurisdiction to prosecute a Brule Sioux for the murder of another member of the tribe. Although *Crow Dog* led to widespread support for extending federal jurisdiction to major intratribal crimes, the decision itself merely confirmed the nineteenth century approach to Indian country crimes. During the nineteenth century, through treaties and statutes, the federal and territorial courts had taken jurisdiction over interracial crimes in Indian country but intratribal crime remained the exclusive province of the tribes. *See generally* Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 953-62 (1975). The Major Crimes Act was thus an unprecedented interference with intratribal relations.

230. 104 U.S. 621 (1881).

231. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 500 (1946); *see also* Draper v. United States, 164 U.S. 240, 247 (1896). For a discussion of the *McBratney* rule, its evolution and its application, see Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 524-26 (1976).

232. *McBratney*, 104 U.S. at 624. The contention is, of course, absurd. Activities within the territory of the sovereign, in particular criminal conduct within the territory, vitally concern sovereign interests. Nonetheless, the Court has continued to reiterate its belief that non-Indian conduct within tribal territories is somehow outside the ambit of the tribes. And each time it makes that finding, it erodes a bit more of the territorial sovereignty left to the tribes. *See infra* text accompanying notes 233-64.

233. 435 U.S. 191, 212 (1978). Oliphant was arrested during the Tribe's annual celebration and charged with assault of a tribal police officer and resisting arrest. *Id.* at 194. Because the victim of the crime was Indian, the *McBratney* rule for state jurisdiction of crimes involving non-Indians was not relevant. *See supra* text accompanying notes 230-32.

The *Oliphant* decision has been well and thoroughly criticized. *See, e.g.*, Russel L. Barsh & James Y. Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993); Williams, *supra* note 5, at 267-274.

234. 435 U.S. at 209. *But see* Ball, *supra* note 5, at 36-38. Professor Ball argues convincingly that the *Oliphant* decision itself was the event that accomplished the legal incorporation of the tribes into the United States. He demonstrates that the Court's prior case law, and in particular the Marshall cases on which *Oliphant* relied, disclaimed rather than established the tribes' incorporation within the Republic. *See Oliphant*, 435 U.S. at 209,

divested of all powers "inconsistent with their status."[235] Those powers inconsistent with tribal status, the Court determined, were not limited to the powers of external sovereignty,[236] but encompassed all powers other than the right to govern relations internal to the tribe.[237] Accordingly, the Court held, Indian tribes were divested of any sovereign power to criminally prosecute non-Indians.[238]

While *Oliphant* did not directly implicate the allotment program, the Court made a point of noting the effects of allotment on the Suquamish Indian Reservation. Nearly two-thirds of the reservation land was held in fee by non-Indians, and most of the trust land was "unimproved acreage upon which no persons reside." Out of a total population of nearly 3000, only about fifty persons were members of the Suquamish Tribe.[239] While these facts were technically irrelevant to the holding, their influence on the Court's decision is suspect.[240] Underlying the Court's decision is a clear sense of unease in permitting tribes to exercise criminal jurisdiction over non-Indians, particular-

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235. 435 U.S. at 208. The phrase was coined by the court of appeals in Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), and was quoted by the Court with approval.

236. Oliphant v. Suquamish Indian Tribe, 435 U.S. at 209. That is, the powers implicitly lost were not restricted to those identified by Chief Justice John Marshall in the early decades of the nineteenth century, which dealt with the relations between the tribes and other sovereign nations. *Id.*; *see supra* text accompanying notes 2-4.

237. *Oliphant*, 435 U.S. at 209-10. The Court quoted for this proposition a concurring opinion from an 1810 case, arguing that the tribes were divested of "*the right of governing every person within their limits except themselves.*" *Id.* at 209 (quoting Fletcher v. Peck, 6 Cranch 87, 147 (1810) (Johnson, J., concurring)) (emphasis added by the *Oliphant* Court). *But see* Ball, *supra* note 5, at 39 n.171 (contending that what Johnson meant in 1810 was significantly different from Rehnquist's use of the phrase nearly 170 years later).

238. *Oliphant*, 435 U.S. at 210. The issue in *Oliphant* was the authority of the tribes to exercise criminal jurisdiction over non-Indians. In a companion case, however, the Court spoke in terms of tribal authority over nonmembers rather than non-Indians. United States v. Wheeler, 435 U.S. 313, 322 (1978). In *Wheeler*, the Court stated in dicta that tribal powers of self-government involve "only the relations among members of a tribe." *Id.* at 326. That left an opening for a nonmember Indian defendant to assert that a tribe had no more jurisdiction over him than it would have over a non-Indian. In *Duro v. Reina*, the Supreme Court agreed, restricting tribal criminal jurisdiction to members of the prosecuting tribe. 495 U.S. 676 (1990). Within months, Congress overturned the *Duro* decision, providing expressly that tribal powers of self-government include "the inherent power of an Indian tribe, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2) (1988). On the *Duro* decision and the congressional "fix," see Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AMER. INDIAN L. REV. 109 (1992); Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993); Kenneth Factor, Comment, *Tightening the Noose on Tribal Criminal Jurisdiction*, 27 TULSA L.J. 225 (1991).

239. *Oliphant*, 435 U.S. at 193 n.1.

240. The unanswerable but intriguing question is whether the Court would have held differently had it been presented with "good" facts: a similar crime occurring on a reservation that was virtually all trust land and with an overwhelmingly Indian population. Given the racist basis of the decision in *Oliphant*, it is likely the Court would have ruled against tribal jurisdiction in any case, but it would have had a harder time justifying its decision without the effects of allotment on the Suquamish Reservation.

ly in situations where the tribe is vastly outnumbered in land ownership and population.[241]

What may have been merely an influence in *Oliphant*, however, became the dominant factor in *Montana v. United States*,[242] where the Court divested the tribe of sovereign powers on the basis of the effects of allotment. Like most tribes, the Crow Tribe of Montana had been subject to the allotment program:[243] tribal lands had been allotted; surplus lands had been sold; and considerable land had passed into non-Indian ownership, leading inevitably to a significant non-Indian presence within the Crow Reservation. As a result of the allotment years, by 1981 more than one-quarter of the Crow Reservation was held in fee by non-Indians. While more than two-thirds of the Crow territory continued in trust, most of the remaining trust lands were held as trust allotments.[244]

In 1974, the Crow Tribal Council adopted a resolution prohibiting all hunting and fishing within the reservation by anyone not a member of the Crow Tribe. The prohibition extended throughout the territorial boundaries of the reservation, and consequently barred non-Indians from hunting and fishing even on fee-owned lands. In *Montana*, the Supreme Court struck down the resolution as beyond the sovereign powers of the Tribe to regulate that legacy of allotment: non-Indians on non-Indian fee land.[245] The Court held that the effects of allotment in Crow country divested the tribe of both its treaty-recognized and its inherent rights to territorial sovereignty.[246]

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241. For example, the Court noted that while the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41, extends most of the constitutional due process guarantees to tribal prosecutions, non-Indians could not, under tribal law, serve on Suquamish juries. The Court was quite openly disturbed at the idea of subjecting non-Indians to trial by Indian juries in Indian courts. It quoted language from nearly a century earlier, rejecting federal jurisdiction over crimes committed by Indians. "It tries them, not by their peers, nor by the customs of their people, nor the law of their lands, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . ." *Oliphant*, 435 U.S. at 211 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)). The Court chose, in this context, to ignore not only the due process guarantees of the Indian Civil Rights Act, but also the facts that the Suquamish maintained a Law and Order Code covering the offenses in question and that assault on a law enforcement officer and resisting arrest are hardly crimes of "a different race" of which non-Indians could have but "an imperfect conception."

242. 450 U.S. 544, 564-67 (1981).

243. The General Allotment Act of 1887 was put into effect in Crow territory by the Crow Allotment Act of 1920, 41 Stat. 751.

244. *Montana*, 450 U.S. at 548. Tribal trust land represented only 17 percent of the Crow Reservation. Trust allotments accounted for 52 percent, non-Indian fee lands for 28 percent, state-owned fee lands for two percent, and federal lands for one percent. *Id.*

245. *Id.* at 564-65.

246. *Id.* at 548. The Court also rejected an argument that the Crow Tribe held title to the bed of the Big Horn River and could therefore prohibit non-Indian use on the basis of ownership. *Id.* at 550-57. For a critique of that aspect of the decision, see Barsh & Henderson, *supra* note 23.

The 1868 Treaty of Fort Laramie established the Crow Reservation as land "set apart for the absolute and undisturbed use and occupation" of the tribe, and obligated the United States to prevent non-Indians from passing through or residing in the Crow territory.[247] While these treaty provisions arguably recognized a right of the Crow Tribe to control hunting and fishing, the Court said, they did so *only* as to those lands over which the Tribe retained its "absolute and undisturbed use and occupation."[248] Lands now held in fee by non-Indians as a result of the allotment policy, the Court then held, are not lands over which the Tribe now exercises exclusive use and occupation.[249] Allotment, in other words, divested the tribes of territorial sovereignty over allotted lands subsequently lost to non-Indian owners.

Moreover, the Court found that it would be inconsistent with the purposes of the allotment policy to interpret the treaty as recognizing tribal authority over non-Indian lands. "It defies common sense," the Court asserted, to believe that Congress intended to subject non-Indian fee owners to tribal jurisdiction when the ultimate purpose of the allotment policy was the "destruction of tribal government."[250] The Court expressly rejected any notion that it should interpret the Treaty of Fort Laramie in light of Congress's repudiation of the allotment policy in 1934. On the contrary, the Court insisted, the only "relevant" inquiry was the effect of allotment on land ownership within the Crow Reservation.[251]

Having eliminated the treaty as a source of tribal rights over non-Indian fee owners, the Court then turned to the inherent sovereign authority of the Tribe. Those inherent rights, the Court held, were insufficient to support the authority of the Crow Tribe to regulate activities on non-Indian fee land.[252] For support, the Court turned to its decision three years earlier in *Oliphant*.[253] The Court reiterated the doctrine underlying *Oliphant*: that Indian tribes, by virtue of their dependent status, have been implicitly

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247. 15 Stat. 649, *quoted in Montana*, 450 U.S. at 558.

248. *Montana*, 450 U.S. at 558-59.

249. *Id.* at 559.

250. *Id.* at 559 n.9.

251. *Id.*

> The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act. But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.

Id. (citation omitted). As noted earlier, the Court took precisely the same approach in County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 269-70 (1992), determining that the fee status of the land, not the repudiation of the allotment policy, was the relevant factual basis for the decision. *See supra* text accompanying note 129.

252. *Montana*, 450 U.S. at 563.

253. *See supra* text accompanying notes 233-41.

divested of all sovereign rights inconsistent with that status. In particular, the dependent status of tribes is inconsistent with tribal control over non-Indians; the retained sovereign powers of the tribes extend only to the relations among the tribe and its people.[254] Based on this broad sweep of the idea of implied divestiture, the Court stated that *Oliphant* stands for "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[255]

The Court immediately, however, recognized exceptions: instances in which tribal sovereign authority extended to non-Indian conduct within tribal territory. First, the Court held, tribes retain inherent authority to regulate the activities of non-Indians who enter into consensual relationships with the tribe or its members.[256] Second, even as to non-Indian activities on fee land, tribes retain inherent authority to regulate conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[257] Despite the apparently broad sweep of these exceptions, however, the Court held that neither was relevant to the exercise of Crow jurisdiction over non-Indian hunting and fishing. Non-Indians hunting and fishing on fee lands do not enter into any consensual dealings with the Crow Tribe.[258] Nor do their activities have any direct effect on tribal sovereignty.[259] In particular, the Court noted that because the State of Montana had historically regulated hunting and fishing on fee lands and because the Crow Tribe had asserted no authority over non-Indian hunting and fishing on the reservation at the time of the Crow Allotment Act,[260] tribal control of hunting and fishing on fee lands "bears no clear

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254. *Montana*, 450 U.S. at 563-65 (referencing *Oliphant* and its companion case, United States v. Wheeler, 435 U.S. 313, 326 (1978)).

255. *Id.* at 565.

256. "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Under this type of inherent power, for example, tribes retain authority to tax non-Indians who do business on the reservation. *See* Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 201 (1985).

257. *Montana*, 450 U.S. at 566.

258. *Id.*

259. *Id.*

260. *Id.* at 564 n.13. There are several problems with this reasoning. First, the Court failed to explain why the Crow Tribe, at the time of the Allotment Act—a time when there were no non-Indian fee lands within the territory—would have nonetheless exercised jurisdiction over those non-existent lands. The Court's construct thus would be merely silly if it did not have such an important effect. Second, the Court's argument regarding the lack of Crow jurisdiction over non-Indians in the early twentieth century seems to presume that if the tribe did not exercise jurisdiction in the past, it may not do so now, even if that authority is otherwise lawful. This use-it-or-lose-it approach to tribal sovereignty could be particularly damaging as tribes increasingly assert their sovereign powers. (As it has been in the reservation diminishment cases, where the similar "de facto" disestablishment analysis has been used to find that lands are no longer tribal territory. *See supra* text accompanying notes 215-18.) Conversely,

relationship to tribal self-government or internal relations."[261] Accordingly, it is a power inconsistent with the dependent status of the Crow Tribe and therefore divested.[262]

Montana thus directly tied tribal sovereign regulatory powers to the fee-lands legacy of the allotment years. Whatever general regulatory powers inhered in the tribe as a sovereign or were guaranteed to the tribe by treaty, the Court held, those powers were abrogated by operation of the General Allotment Act. Because of the change in title and the loss of tribal ownership, the tribe also lost the sovereign authority to regulate certain conduct within its territory. Despite the fact that fee lands within reservations are part of Indian country[263] and that Indian country generally represents the territorial boundaries of tribal sovereignty, the Court bifurcated tribal powers along land tenure lines. As to regulation of conduct on trust lands, including the conduct of non-Indians, tribal power remains plenary.[264] But as to regulation of that same conduct on fee lands by non-Indians, tribal power is divested absent some direct effect on tribal sovereignty.[265]

The "direct effects" test that the Court constructed to provide exceptions for conduct on fee lands begged the question. Territorial integrity—the right of the sovereign to control persons and activities within its territory—is a central tenet of sovereignty. Any loss of territorial integrity necessarily has a direct effect on tribal sovereignty: it trenches upon a basic sovereign right. To argue, as the Court did, that the loss of the power to regulate activities within the sovereign's territorial borders "bears no close relationship" to self-government is oxymoronic.

Despite its lack of logic, the direct effects test proved highly useful to tribes in the years following the *Montana* decision. Tribes were, virtually

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the Court seemed to assume that because the state exercised jurisdiction, that authority was therefore valid. The reasoning is circular: because the state exercised jurisdiction, the tribe could not, and because the tribe could not, the state must be entitled. In *Montana*, as in the reservation diminishment cases, the Court seems willing to presume that any exercise of state jurisdiction is legitimate simply from the fact that it exists.

261. *Montana*, 450 U.S. at 564. The Court refused to consider even the issues suggested by common sense. For example, hunting generally involves the use of firearms. Non-Indian use of guns within tribal territory is surely an activity that implicates the safety and welfare of the reservation residents. For another example, any hunting and fishing depletes the existing stock. Preventing non-Indians from harvesting to the point that sufficient game is not available for tribal use again seems clearly to implicate tribal health and welfare, and in the case of commercial hunting and fishing activities, the economic security of the tribe as well.

262. *Id.* at 565.

263. 18 U.S.C. § 1151(a) (1988).

264. As the *Montana* Court noted: "The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree." 450 U.S. at 557 (citation omitted).

265. *Id.* at 566.

without exception, able to convince lower federal courts and tribal courts that a range of non-Indian conduct on fee lands would have sufficient direct effects on tribal sovereignty to justify tribal regulation.[266] For all practical purposes, the direct effects exception swallowed the "general proposition"[267] that tribes were divested of sovereign authority over non-Indian fee lands.

Then in 1989, the Supreme Court decided the zoning case of *Brendale v. Yakima Indian Nation*,[268] and the direct effects test was put in jeopardy. In the years following the *Montana* decision, one of the tribal powers over non-Indian fee land most often upheld was the power to zone.[269] Zoning—the power of the sovereign to determine the use of its land base—is a governmental power central to the exercise of territorial sovereignty.[270] Only by regulating the use made of its land, through the separation of incompatible uses, the regulation of potentially harmful uses, and the promotion of beneficial uses,[271] can the sovereign fully protect and promote the interests of its resident population.

Nonetheless, the Court in *Brendale* determined that the power to zone fee lands depended upon the modern legacy of allotment. As in *Montana*, the Court did not question the exclusive sovereign right of the tribe to regulate on trust lands. As to trust lands within the Yakima Reservation, the Yakima

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266. *See* Cardin v. De La Cruz, 671 F.2d 363, 366-67 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) (tribal building, health and safety codes); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982) (tribal regulation of riparian rights); Lummi Indian Tribe v. Hallauer, 9 Indian L. Rep. 3025, 3027-28 (W.D. Wash. 1982) (tribal sewer hook-up requirements). In particular, courts were amenable to claims that zoning of fee lands was within inherent tribal sovereign authority. *See* Knight v. Shoshone & Arapaho Indian Tribes, 670 F.2d 900, 903 (10th Cir. 1982); Governing Council of Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042, 1044-45 (N.D. Cal. 1988); Colville Confederated Tribes v. Cavenham Forest Indus., 14 Indian L. Rep. 6043, 6043 (Colv. Tr. Ct. 1987).

267. *See Montana*, 450 U.S. at 565.

268. 492 U.S. 408 (1989). For discussions of *Brendale*, see Singer, *supra* note 10, at 7-8; Judith V. Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, 1 KAN. J.L. & PUB. POL'Y 89 (1991); Thomas W. Clayton, Note, Brendale v. Yakima Nation: *A Divided Supreme Court Cannot Agree Over Who May Zone Nonmember Fee Lands Within the Reservation*, 36 S.D. L. REV. 329 (1991); Craighton Goeppele, Note, *Solutions for Uneasy Neighbors: Regulating the Reservation Environment After* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 65 WASH. L. REV. 417 (1990).

269. *See* cases cited *supra* note 266.

270. *See, e.g.*, Governing Council of Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042, 1044 (N.D. Cal. 1988). *See also Brendale*, 492 U.S. at 458 (Blackmun, J.) (citation omitted) ("It would be difficult to conceive of a power more central to 'the economic security, or the health or welfare of the tribe,' than the power to zone.").

271. For these reasons, also, land use planning is particularly unamenable to checkerboard jurisdiction, where both the tribe and the state have authority over certain lands within the Indian country. Nonetheless, the *Brendale* decision creates that impractical checkerboard of zoning authority within at least some reservations.

Nation and only the Yakima Nation had the authority to zone.[272] The issue before the Court, rather, was the sovereign power of the Yakima Nation to zone non-Indian fee lands within its tribal territory.[273]

Once again, the outcome depended upon the legacy of allotment: in this case, on the extent of the destruction wrought by the allotment policy. The Court limited tribal authority to zone non-Indian fee lands to those reservations, or sections of reservations, that had survived allotment relatively intact. Where a reservation, or part of a reservation, had suffered too greatly from allotment, however—where there was now sufficient non-Indian land ownership—then the tribe was divested of the sovereign power to zone fee lands, and that authority belonged to the county.

This outcome resulted from the peculiar configuration of the Yakima Reservation. Yakima territory is roughly divided into two sections.[274] In the "open" northeastern section nearly half the land is owned in fee by non-Indians, there are three incorporated towns,[275] and Yakima Nation members make up less than twenty percent of the population.[276] The western or "closed" two-thirds of the reservation, however, is primarily forest land and contains only a small percentage of non-Indian land.[277] The *Brendale* decision was based on consolidated cases involving two owners of fee land, one in the open section and one in the closed section, who wanted to develop

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272. *Brendale*, 492 U.S. at 445 (Stevens, J.), 460 (Blackmun, J.).

273. It may perhaps be more accurate to say that the issue was tribal authority to zone lands owned in fee by nonmembers. Justice White defined the issue as the Tribe's "authority to zone fee lands owned by nonmembers of the Tribe . . . ." *Id.* at 414. However, it appears that the Court treated the fee owners as jurisdictionally non-Indians. The case involved two parcels of fee land. One parcel was owned by Stanley Wilkinson, a non-Indian. *Id.* at 418. The other was owned by Philip Brendale, "who is part-Indian but not a member of the Yakima Nation." *Id.* at 417. It is not clear from that description whether the Court was treating Brendale as a non-Indian or as a nonmember Indian, because at no point did the Court find that Brendale was in fact an "Indian" for jurisdictional purposes as opposed to racially part-Indian. *See id.* (identifying Brendale as "part Indian but not a member of the Yakima Nation"). Moreover, the decision ultimately held that the county had authority to zone the fee lands only in the "open" area of the reservation; Wilkinson's land was located in the open area, and the opinion thus upheld county authority to zone *non-Indian* fee lands. *See id.* at 428, 432. Brendale's property was in the "closed" area over which the tribe's authority was upheld. *See id.* at 432. As a result, it is also not clear, despite Justice White's statement of the issue, that the Court limited tribal authority over nonmember Indian-owned fee lands in the same manner that it limited tribal authority over non-Indian fee lands. On the question of who is an Indian for jurisdictional purposes, see Clinton, *supra* note 231, at 513-20; Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 79-86 (1993).

274. *Brendale*, 492 U.S. at 415 (White, J.).

275. *Id.*

276. *Id.* at 447 (Stevens, J.).

277. *Id.* at 415 (White, J.). Justice Stevens noted that most of the fee land was owned by lumber companies. Excluding that land, less than one percent of the closed area was owned in fee. In addition, there were no permanent residents in the closed area. *Id.* at 438.

their parcels in accordance with county zoning policies, but in opposition to Yakima zoning ordinances.

The nine justices were unable to find a majority for any one approach to zoning authority. Consequently, the Court split 4-3-2: four justices argued that the county had exclusive zoning authority over all non-Indian land within the reservation;[278] three justices, dissenting, argued that the tribe had exclusive zoning authority over all land within the reservation, regardless of ownership;[279] and two justices, the swing votes, found that the county's right to zone non-Indian land depended on the extent of non-Indian land ownership.[280]

Justice White, writing the four-justice plurality opinion, gave the opinion of the Court regarding the open area.[281] Much of White's opinion was ostensibly a reprise of the Court's *Montana* decision, but a crabbed and hard-line reading of that analysis. White made quick work of the Yakima Nation's arguments that its zoning authority rested either on its treaty rights or its inherent sovereign powers. The Yakima treaty, similar to the Crow treaty at issue in *Montana*, set the tribal territory aside for "the exclusive use and benefit" of the Nation and promised that no whites other than Indian agents would be permitted in Yakima territory without the consent of the Nation.[282] But the Yakima, again like the Crow, were subject to allotment under the auspices of the General Allotment Act. Like *Montana*, White's opinion in *Brendale* held that because former allotments within Yakima country were now owned in fee by non-Indians, those fee lands were no longer set aside for the exclusive use and benefit of the Nation. Therefore, White held, the Nation was divested of its treaty right to regulate those fee lands, including the right to zone them.[283]

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278. *See id.* at 428 (White, J.) (the opinion of the court as to non-Indian lands located in areas of the reservation with significant non-Indian ownership). Justice White was joined by Chief Justice Rehnquist and Justices Kennedy and Scalia. *Id.* at 414.

279. *See id.* at 448 (Blackmun, J.). Justice Blackmun was joined by Justices Brennan and Marshall. All three dissenting justices are now retired from the Court. The dissent did not actually recognize unfettered territorial sovereignty. Instead, Justice Blackmun waffled on the issue, positing that there may be "essentially self-contained, definable areas in which non-Indian fee lands so predominate that the tribe has no significant interest in controlling land use." *Id.* at 447. He noted that the three incorporated towns within the Yakima Reservation might constitute such areas, but also noted that the Yakima Nation had never asserted zoning authority within the towns. *Id.* at 467 n.9.

280. *Id.* at 433 (Stevens, J.) (the opinion of the court as to non-Indian lands located in areas of reservations with no significant non-Indian land ownership). Justice Stevens, who was joined by Justice O'Connor, upheld exclusive tribal zoning authority in "closed" areas and county zoning authority in "open" areas.

281. *Id.* at 432.

282. 12 Stat. 951, 952 (1859) (quoted in *Brendale*, 492 U.S. at 422); *see also Montana*, 450 U.S. at 559 (explaining the Crow Treaty).

283. 492 U.S. at 422-23.

Justice Stevens, author of the swing decision, agreed in part that the General Allotment Act "in some respects diminished tribal authority."[284] Nonetheless, Stevens engaged in an idiosyncratic interpretation of Congress's intent in instituting the allotment program. Based on no evidence in the language or legislative history of the General Allotment Act, Stevens found that while

> it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy.[285]

Stevens thus held that the Act divested the Yakima Nation of its authority only in those "open" areas where the legacy of allotment, in the form of nonmember fee lands, was sufficiently widespread.[286]

Only the dissenters agreed with the Yakima Nation that the congressional intent which mattered was that contained in the Indian Reorganization Act of 1934 and its express repudiation of allotment.[287] But Justice Blackmun's argument that the Nation's authority to zone should be interpreted in light of the IRA policy of promoting tribal self-government was unavailing. A majority of the justices believed that the ultimate aim of the discredited allotment policy, the destruction of the tribes,[288] should continue to control tribal authority decades after the allotment program was terminated.

Justice White in his plurality opinion also rejected the argument that the Yakima Nation retained any inherent sovereign authority to zone non-Indian fee lands within Yakima territory. The opinion relied, as had *Montana*, on the Court's criminal jurisdiction cases of 1978.[289] This time, however, White upped the ante. He found that any tribal regulation of the relations between the tribe and nonmembers was "*necessarily*" inconsistent with tribal status and therefore automatically divested.[290] Justice Blackmun argued in

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284. *Id.* at 436 (Stevens, J.).

285. *Id.* at 437.

286. *See id.* at 447.

287. *Id.* at 464 (Blackmun, J.).

288. *Id.* at 423 (White, J.).

289. *Id.* at 425-27. In particular, White relied on language in United States v. Wheeler, 435 U.S. 313 (1978), the companion case of *Oliphant*, 435 U.S. 191 (1978). For discussion of *Oliphant* see *supra* text accompanying notes 233-41.

290. *Brendale*, 492 U.S. at 427 (White, J.) (emphasis added). Justice Blackmun had argued that under *Montana* tribes were implicitly divested of only those powers necessarily inconsistent with their status. *Id.* at 451-52. Justice White turned that analysis on its head by holding that *all* relations between tribes

dissent, to no avail, that the Court in *Montana* had "simply missed its usual way" and issued an opinion inconsistent with the Court's prior decisions on the scope of inherent tribal sovereignty.[291] Blackmun, however, was unable to enlist a majority of the justices in his admirable, if belated, attempt to undo the damage caused by *Montana*.

Justice Stevens, while clearly not agreeing with Justice Blackmun, did not fully subscribe to Justice White's view either. Rather than find that all tribal authority was automatically divested once Indian country lands passed into non-Indian fee status, Stevens developed a complicated and impractical formula based on the extent of non-Indian fee lands within the tribal territory.[292] Stevens saw a crucial and deciding difference between the open and the closed areas of the Yakima Reservation, with the controlling factor the "essential character" of the land.[293] Where a region is "almost entirely . . . reserved for the exclusive benefit of the Tribe,"[294] then the tribe retains the power, through its exercise of zoning authority, to "define the essential character of that area."[295] Thus Stevens held, for the Court, that the Yakima Nation retained the power to zone all lands within the closed area of the reservation.[296] However, where a "large percentage" of the land is owned in fee by non-Indians, the tribe has lost its sovereign ability to exclude those non-Indians from the territory and consequently has ceased to be able to "establish the essential character of the region."[297] The region then has lost its "Indian" character and become "an integrated portion of the county," in which county zoning power predominates.[298] Accordingly, Stevens agreed with White that the county possessed zoning authority over non-Indian fee lands in the open area of the Yakima territory.[299] Based, then, on the legacy of allotment, the Court found that the Yakima Nation

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and nonmembers involve powers that are, by definition, necessarily inconsistent with the dependent status of the tribes. *See id.* at 427.

291. *Id.* at 455 (Blackmun, J.).

292. Stevens' approach did much to ameliorate the harshness of Justice White's view. Nonetheless, despite some measure of gratitude for his failure to join White and thereby create a majority decision totally adverse to tribal interests, his approach is virtually devoid of logic. As Justice Stevens himself noted, in a masterpiece of understatement, he had not created "a bright-line rule." *Id.* at 447.

293. *See id.* at 441 (Stevens, J.).

294. *Id.* at 442. The argument could be made that Stevens' phrase is a good description of Indian country, and therefore under his formulation the tribes should have zoning authority throughout their territories.

295. *Id.* at 441.

296. *See id.* at 414. "In my view, the fact that a very small proportion of the closed area is owned in fee does not deprive the Tribe of the right to ensure that this area maintains its unadulterated character." *Id.*

297. *Id.* at 446.

298. *See id.* at 447.

299. *See id.* at 448.

retained its inherent powers to zone non-Indian fee lands where the allotment program had not been widespread but had lost its powers to zone non-Indian fee lands where the allotment program had been particularly devastating.

The general authority of the county to zone in the open area, however, did not end the Court's inquiry. Instead, the Court turned to *Montana*, which had recognized the right of Indian tribes to regulate the activities of non-Indians on non-Indian land where those activities would threaten or have some "direct effect" on tribal sovereign interests.[300] Nothing has a more direct effect on a tribe's political integrity, economic security, or health and welfare, the Yakima argued, than the use of the land.[301] Land use planning through zoning is a fundamental method for regulating activities that may have detrimental effects on the sovereign.[302]

Justice White, in response, blithely rewrote the *Montana* direct effects test in two significant ways, all the while maintaining his fidelity to the Court's previous decision. First, he noted that *Montana* said a tribe "may" retain authority to regulate non-Indians where effects on tribal health and welfare will result.[303] This one word, Justice White concluded, meant that tribal authority does not extend to all conduct that threatens or even adversely affects tribal health and welfare.[304] Instead, the impact of the non-Indian activity on non-Indian land "must be demonstrably serious and must imperil the political integrity, the economic security or the health and welfare of the tribe."[305] Only then will tribal interests prevail.[306] In this case, however, the district court had found that the proposed development in the open area did not have any direct effect on the Yakima Nation, and therefore White summarily concluded that the proposed development would "not imperil any interest of the Yakima Nation."[307]

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300. *Montana*, 450 U.S. at 565-66.

301. *Brendale*, 492 U.S. at 428 (White, J.), 458 (Blackmun, J., dissenting).

302. *Id.* at 433 (Stevens, J.).

303. *Id.* at 428.

304. *Id.* at 429.

305. *Id.* at 431.

306. Even then, White would not have tribal interests prevail automatically. Instead, White would require the tribe to appear before the county zoning authority to argue the direct effects on the tribe. *Id.* If the county failed to recognize the tribal interests, the tribe could then sue in federal court. *Id.* at 432. As Justice Blackmun noted in his dissent, the Court divested the tribe of its sovereign right to control land use and substituted "the opportunity to engage in protracted litigation over every proposed land use that conflicts with tribal interests. . . ." *Id.* at 460.

307. *Id.* at 432. The Yakima Nation, of course, disagreed, because it had prohibited the development which the Court found would have no effect on the Nation's interests. As Professor Singer notes: "Assuming that the Yakima Nation prohibited the development for a reason, we can only conclude that the interests of American Indians are simply not recognized as *real*." Singer, *supra* note 10, at 38.

In dissent, Justice Blackmun was appalled. The word "may" in the *Montana* direct effect test, he argued, was not intended to limit the application of that test, but resulted merely from the fact that the discussion of the *Montana* exceptions was dicta to the holdings of that case.[308] Nonetheless, Blackmun himself may have limited the reach of *Montana*'s direct effects test. He would have held that tribes retain the right to regulate non-Indians on fee lands only when the non-Indian conduct directly affects a "significant" tribal interest.[309] Blackmun, however, strenuously argued that zoning, the power to control land use, definitely and directly affects significant tribal sovereign interests.[310]

The second important way in which Justice White reworked the direct effects test is more subtle. In *Montana*, the question was whether the tribe could control hunting and fishing on non-Indian fee lands because of the effect of those activities on tribal sovereign interests.[311] In *Brendale*, the issue should have been whether the tribe could zone non-Indian fee lands because of the effects of checkerboard zoning on tribal sovereign interests. But only Justice Blackmun took that global view of the issue under the direct effects analysis. In his view, the question was whether zoning of non-Indian fee lands would significantly affect tribal interests.[312] Justice White, by contrast, trivialized the tribal concerns. Under his approach, the question was whether a particular proposed use of a particular non-Indian parcel would imperil tribal sovereignty.[313] If White's view prevails, then the burden on tribes to show direct effects has increased greatly. It is a far more difficult matter to show that the development of 20 single-family homes[314] substantially impacts tribal sovereignty than it is to show that the tribe's inability to engage in comprehensive land use planning of its territory substantially impacts its sovereign rights.

The decision in *Brendale* thus has the potential to seriously disrupt tribal territorial sovereignty. Based on the allotment legacy of non-Indian fee lands, the Court gave the state unprecedented authority over "open" Indian country, constrained only by a watered-down direct effects test. The only glimmer of optimism for the tribes comes from the schizophrenia created by

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308. *Brendale*, 492 U.S. at 459 (Blackmun, J., dissenting).

309. *Id.* at 457. Blackmun may have been using "significant" as a shorthand for "political integrity, economic security, or the health and welfare" interests identified in *Montana*, 450 U.S. at 566. Nonetheless, the "significant" language appears nowhere in the *Montana* formulation and would potentially have provided an argument for states looking to regulate fee lands in Indian country.

310. *Brendale*, 492 U.S. at 458.

311. 450 U.S. at 547.

312. *Brendale*, 492 U.S. at 450 (Blackmun, J., dissenting).

313. *See id.* at 428-31.

314. This was the fee owner's proposed use of his land in the open area. *Id.* at 418 (White, J.).

Justice Stevens. Where a tribal territory, or a portion of a tribal territory, did not suffer greatly from the legacy of allotment, it retains its essential Indian character.[315] And when the essential Indian character of the area remains, so too does the tribe's inherent sovereign authority to regulate throughout the area.[316] In those "closed" areas or reservations, the direct effects test of *Montana* is irrelevant; in closed areas, tribes are not forced to meet some standard of sufficient interests but retain their original sovereign rights to regulate. For closed areas, then, Justice Stevens restored tribal territorial sovereignty.

Nonetheless, given the plethora of opinions in *Brendale* and the lack of a majority opinion, its effects were uncertain. Then, in 1993, the Court decided *South Dakota v. Bourland*.[317] Justice Thomas, in his first foray into Indian law jurisprudence,[318] removed any lingering doubts about the Court's approach to tribal territorial sovereignty. Writing for a majority,[319] Thomas rejected both inherent and treaty-recognized tribal authority to regulate. Thomas disposed of inherent tribal regulatory authority in a footnote: after *Montana*, he wrote, "the reality" is that "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' and is therefore *not* inherent."[320] That statement, however, is simply not true. Under *Montana* and *Brendale*, tribes retain full inherent regulatory authority in closed areas, as well as inherent regulatory authority in open areas where the non-Indian conduct sufficiently impacts tribal interests. That authority is

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315. *See id.* at 422-25. Justice Blackmun points out that this approach is racist and stereotypical, viewing Indians as some quaint holdover from the nineteenth century. 492 U.S. at 464-65; *see generally* ROBERT F. BERKHOFER, JR., WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT (1978). While that certainly seems an accurate reading of Justice Stevens' opinion, Stevens nonetheless offered some tribes a way around state intrusion into tribal territorial jurisdiction.

316. *Id.*

317. 113 S. Ct. 2309 (1993). For discussions of *Bourland*, see Veronica L. Bowen, *The Extent of Indian Regulatory Authority Over Non-Indians:* South Dakota v. Bourland, 27 CREIGHTON L. REV. 605 (1994); John H. McClanahan, Note, *Indian Law—Tribal Sovereignty—Congress, Please Help Again—The Cheyenne River Sioux Tribe Cannot Regulate Hunting and Fishing Because the Non-Indian Interest Controls.* South Dakota v. Bourland, 29 LAND & WATER L. REV. 505 (1994).

318. *Bourland* was the first Indian law case decided by the Court after Thomas was confirmed. While no one expected Justice Thomas to take the philosophical place of Justice Marshall, whom he replaced on the Court, Thomas' authorship of the majority decision in *Bourland* seems to pile insult on top of injury.

319. The *Bourland* decision was 7-2, with Justices Blackmun and Souter dissenting.

320. *Bourland*, 113 S. Ct. at 2320 n.15 (quoting *Montana*, 450 U.S. at 564). What the Court actually said in *Montana* was that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. The *Montana* decision at no point equated "unnecessary" tribal power with tribal authority over nonmembers. The *Bourland* Court's reading of *Montana* was vigorously disputed by Justice Blackmun in his dissent. 113 S. Ct. at 2321-23 (Blackmun, J., dissenting).

not delegated; it is inherent.[321] At most, then, the Court's statement in the *Bourland* footnote applies only to inherent tribal authority to regulate the conduct of non-Indians on fee land when that conduct is not encompassed within either of the *Montana* exceptions.

Justice Thomas also refused to find any treaty-protected sovereign right to regulate non-Indian lands. As to treaty-recognized rights, Thomas stated that: "*Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands."[322] In so holding, the Court created a bright-line rule that the loss of title means the loss of sovereign authority to regulate.

The Court's statement was particularly disturbing because of the context of the fee lands at issue in *Bourland*. The lands at issue were not former allotments or surplus lands from the allotment years but rather lands within the boundaries of the Cheyenne River Sioux Reservation that were taken by the United States in 1954 for the Oahe Dam and Reservoir project.[323] The purpose of the project was flood control, not the break-up of the reservation and the eradication of the Tribe.[324] Nonetheless, without discussion of the purposes of the congressional legislation that took the lands, the Court simply and destructively equated the loss of title with the loss of sovereign authority, whether or not that might actually have been Congress's intent.[325] In that,

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321. Moreover, the Court has consistently affirmed tribal civil adjudicatory jurisdiction over non-Indian defendants. *See, e.g.*, National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (discussed *infra* at note 382). Again, that authority is inherent, not delegated.

322. *Bourland*, 113 S. Ct. at 2316. The Tribe, of course, did not "convey" ownership to non-Indians in the sense of a voluntary and consensual transfer of ownership. While the Cheyenne River Sioux Tribe did agree to convey its land to the federal government, it did so after Congress had authorized the taking of the Tribe's lands. *Id.* at 2313. "Consenting" to action which the federal government intends to take in any case, perhaps for the purpose of receiving a better price or other concessions, hardly constitutes the sort of casual transfer of land ownership that Thomas' language implies. *See* Singer, *supra* note 10, at 22 (noting a similar problem with the Court's language in *Brendale*).

323. *Bourland*, 113 S. Ct. at 2313-14. The Flood Control Act of 1944, ch. 665, 58 Stat. 887, authorized comprehensive flood control along the Missouri River. Congress subsequently enacted a series of acts taking Indian lands for those purposes. One of those acts was the Cheyenne River Act of Sept. 3, 1954, 68 Stat. 1191, which took 104,420 acres of trust lands from the Cheyenne River Sioux Tribe. The federal government also took some 18,000 acres that were owned in fee by non-Indians, although "[t]he record does not reflect how these lands had come to be owned by non-Indians." 113 S. Ct. at 2314 n.3. The Court noted that the status of the government's title in the taken lands was not entirely clear, but that the Court would assume the United States owned the taken trust lands in fee. *Id.* at 2314 n.4.

324. *See Bourland*, 113 S. Ct. at 2323 (Blackmun, J., dissenting).

325. *See id.* at 2318. In *Montana* and *Brendale*, the Court relied on Congress's intent in the General Allotment Act of terminating tribal governments. While the intent of Congress in the Indian Reorganization Act would have been more pertinent, the Court at least engaged in a determination of congressional intent based on the specific act that caused the loss of Indian title. In *Bourland*, the Court does not bother. In fact, the Court stated that: "To focus on purpose is to misread *Montana*." 113 S. Ct. at 2318. The Court then quotes *Montana* for the proposition that "'what is relevant . . . is the *effect of*

the Court's approach mirrors the Ninth Circuit's approach in the tax case of *Lummi Indian Tribe v. Whatcom County*.[326] In *Whatcom County*, the court relied upon the Supreme Court's decision in *County of Yakima v. Yakima Indian Nation*, which held that the General Allotment Act authorized state property taxation of allotments once fee patents were issued.[327] The court of appeals in *Whatcom County* applied that holding wholesale to fee land originally allotted pursuant to a treaty, not the General Allotment Act, and it did so without analysis of the treaty to determine whether the same outcome should be reached.[328] That is precisely what the Court in *Bourland* did: it applied the analysis of *Montana* and *Brendale*, which was based on the General Allotment Act, wholesale to a situation involving entirely different statutes, without ever analyzing those statutes to determine whether the same outcome should apply.[329] The legacy of allotment has thus spread like kudzu beyond fee lands that directly resulted from the allotment policy, to reach all lands wrested from Indian ownership.

One ray of hope that emerges from *Bourland* is the Court's apparent adoption of Justice Stevens' *Brendale* approach to closed areas.[330] In *Bourland*, the Court held that the abrogation of absolute and exclusive use and occupation of the territory due to the loss of title, "*at least in the context of the type of area at issue in this case*, implies the loss of regulatory jurisdiction over the use of the land by others."[331] The italicized phrase was footnoted, and in that footnote the Court stated that the federally-owned

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the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.'" *Id.* (quoting *Montana*, 450 U.S. at 560 n.9) (emphasis in *Bourland*). Apparently in that quoted language, the *Bourland* Court missed the phrase "occasioned by that policy," meaning the allotment policy. It was the effect on title *of the allotment policy* that was crucial to the Court's decisions in *Montana* and *Brendale*, not merely the loss of title in a vacuum. For an incisive critique of this aspect of the *Bourland* decision, see Aviam Soifer, *Objects in Mirror Are Closer Than They Appear*, 28 GA. L. REV. 533, 548-49 (1994).

326. 5 F.3d 1355, 1357 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994), discussed *supra* at text accompanying notes 136-41.

327. *Id.* (citing *County of Yakima*, 502 U.S. 251, 262-63 (1992)), discussed *supra* part III.

328. *See* 5 F.3d at 1357.

329. The Court did undertake an analysis of the Flood Control Act and the Cheyenne River Act for other purposes. The Court determined that the Flood Control Act broadly opened taken lands to the general public. It also determined that although the Cheyenne River Act reserved certain rights to the Tribe, it nonetheless did not regrant to the Tribe the regulatory authority which the Tribe possessed under its treaty and which it lost when the lands passed out of Indian ownership pursuant to the Act. 113 S. Ct. at 2317. These aspects of *Bourland* are discussed in McClanahan, *supra* note 317.

330. As noted in connection with the discussion of *Brendale*, Justice Stevens' open-versus-closed distinction is ultimately corrupt, based on some James Fennimore Cooper vision of "Indian" character. *See supra* note 315. Nonetheless, Stevens' approach does preserve territorial sovereignty for those tribes with reservations or areas of reservations that qualify as "closed."

331. 113 S. Ct. at 2316 (emphasis added).

fee lands constituted an "open" area of the Cheyenne River Reservation under the *Brendale* open-versus-closed analysis.[332]

As discussed earlier, Justice Stevens found in *Brendale* that as to closed areas, tribes retain full territorial sovereignty to regulate all lands within the area, including those owned in fee by non-Indians.[333] And as to closed areas, Stevens' opinion in *Brendale* represented the opinion of the Court. Nonetheless, only one other justice joined Stevens' opinion in *Brendale*. In *Bourland*, by contrast, the open-versus-closed dichotomy was adopted by a majority of the justices. Or, at least, a majority adopted the *Brendale* approach to open areas, which should imply that it also adopted the Stevens' approach to closed areas.[334] Assuming that is the case,[335] the *Bourland* decision offers a significant measure of territorial sovereignty for those tribes with closed areas or closed reservations.

Nonetheless, as in *Brendale*, the Court gave short shrift to the tribe's regulatory concerns in the open area.[336] It noted that as to open areas, the *Montana* consensual relations and direct effects tests apply: that is, the tribe retains its sovereign rights to regulate in open areas if the non-Indians entered into consensual relationships with the tribe or if the activities adversely affect the tribe's sovereign interests.[337] The district court had found that neither

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332. *Id.* at n.9. Footnote 9 reads in its entirety:

> The District Court found that the taken area is not a "closed" or pristine area, and the Court of Appeals did not disturb that finding. 949 F.2d, [sic] at 995. We agree that the area at issue here has been broadly opened to the public. Thus, we need not reach the issue of a tribe's regulatory authority in other contexts.

333. *See supra* text accompanying notes 292-98.

334. *See Bourland*, 113 S. Ct. at 2312, 2316.

335. The assumption may not hold. The Court did state that it was not determining the extent of a "tribe's regulatory authority in other contexts." 113 S. Ct. at 2316 n.9. Given the Court's hostility to tribal territorial sovereignty, that phrase is ominous.

336. One commentator disagreed. "The argument that the *Bourland* decision does not adequately protect tribal interests is not well taken. . . . Requiring the tribe to rebut a presumption against tribal authority in the first instance is eminently reasonable in view of the disadvantageous position non-Indians occupy in relation to tribal government." Bowen, *supra* note 317, at 651. That statement is a remarkable example of the non-Indian appropriation of Indian harm. *See* Ball, *supra* note 5, at 5 ("Non-Indians grab even the Indian injury for themselves."). It also represents the ostensibly reasonable, but in fact destructive, view that tribal sovereignty exists only up to the point where it meets non-Indian interests. At that point, the Indian interests must *of course* give way to the non-Indian interests. Far from being "reasonable," that approach in essence gives "*no weight at all*" to the tribal interests at stake because those interests exist only if no competing non-Indian interests are present. *See* Singer, *supra* note 10, at 37 (referring to Justice White's opinion in *Brendale*).

337. 113 S. Ct. at 2320. As to the direct effects test, the Court simply quoted *Montana*, without the reinterpretation engaged in by Justice White in *Brendale*. *See supra* text accompanying notes 303-307. This may indicate a return to the test as originally formulated by the Court. On remand, the Eighth Circuit avoided the issue by finding that the Tribe did not have regulatory authority even under the less stringent *Montana* standard. South Dakota v. Bourland, 39 F.3d 868, 871-72 (8th Cir. 1994) (Heany, J., dissenting).

exception applied, and the court of appeals for the most part had not disturbed those findings.[338] The *Bourland* Court thus left the issue of the *Montana* exceptions to be resolved on remand, but with the clear impression that it expects neither exception to apply.

The Court's decision in *Bourland* thus advances the legacy of allotment traceable back to *Oliphant* and flowering in *Montana* and *Brendale*. With each succeeding decision, the Court becomes more adamant about furthering the allotment policy and less amenable to protecting, or even perceiving, tribal interests. The Court has now declared that tribes possess *no* inherent sovereignty over lands lost to non-Indians under the allotment program or even by other means. Similarly, the Court believes that mere non-Indian title to lands in Indian country automatically abrogates treaty rights to territorial regulatory authority. The Court has focused not on the territory of the tribe, but on the titles within the territory, to determine the extent of tribal jurisdiction.[339]

For the most part, the Court's reasoning has been based on the ultimate aims of the General Allotment Act. The Court has uniformly and stubbornly refused to consider any other factor surrounding the allotment program. It has refused to consider the historical fact that even the sponsors of the General Allotment Act did not intend the immediate dissolution of the reservations but foresaw an ongoing and gradual process.[340] At no time did Congress intend that the sale of fee patented land to non-Indians would result in the immediate destruction of tribal authority. Clear evidence of that is found in the statutory definition of Indian country as including all land within reservation borders, notwithstanding the issuance of any patent.[341] Moreover, in the reservation disestablishment cases, the Court has consistently noted that the mere sale of parcels within the tribal territory to non-Indians

338. 113 S. Ct. at 2320. The court of appeals remanded for a reanalysis of the *Montana* exceptions with regard to the 18,000 acres that had once been fee land, but "it did not pass upon the District Court's previous findings regarding the taken area as a whole." As this article went to press, the Eighth Circuit handed down its opinion on remand. *Bourland*, 39 F.3d 868 (8th Cir. 1994). It affirmed the district court's findings that non-Indian hunting and fishing on the taken lands did not meet the *Montana* direct effects test. Although the non-Indian hunting interfered with tribal cattle grazing and reduced the number of deer available to tribal members, the non-Indian conduct was merely "vexatious" and did not amount to a direct effect on tribal interests. *Id.* at 870. The dissenting judge contended that the district court's findings were based on whether the non-Indian hunting constituted a threat to tribal interests and ignored the "direct effects" alternative of the *Montana* Court. *Id.* at 871 (Heany, J., dissenting). The dissenting judge would have held that the grazing interference and the reduced number of deer, viewed in the context of decades of tribal regulation of non-Indian hunting and fishing on the reservation, were direct effects on tribal interests sufficient to satisfy the *Montana* exception. *Id.* at 872.

339. Dussias, *supra* note 273, at 72; *see generally* Singer, *supra* note 10.

340. *See supra* text accompanying notes 35-36.

341. *See* 18 U.S.C. § 1151(a) (1988).

does not remove those lands from tribal jurisdiction.[342] For the Court, however, those factors are irrelevant; Congress in 1887 intended the ultimate dissolution of the tribes and the Court will carry out that intent regardless.

An additional factor which the Court has failed to consider is the Indian Reorganization Act ("IRA") of 1934.[343] Tribes and dissenting justices have repeatedly urged the Court to look not to the long-term intent of the 1887 Congress, but to the intent of the 1934 Congress. There is simply no question that Congress repudiated the allotment policy in the IRA and that it did so because of the destruction wrought by allotment and related activities.[344] The fact that it did not restore to tribal ownership lands that had passed into non-Indian hands is irrelevant to its intent to terminate the allotment policy. But the Court consistently has refused to consider the purposes and intent of the IRA in dealing with the present effects of the allotment years. Instead, the Court has fixated on the General Allotment Act as the only relevant factor in determining tribal sovereign authority over Indian country a full century and more later.

Similarly, the Court has refused to accord any weight to modern federal Indian policy. For the last 25 years or more, congressional and executive policy has pursued tribal self-determination and governmental authority over the Indian country. And yet the Court treats this fact as cavalierly as it does congressional policy reflected in the IRA. No expression of congressional intent to promote tribal government is apparently sufficient, in the Court's view, to overcome the failed, destructive intent of the General Allotment Act.

The peculiarity in all this, however, is the Court's apparent approach to tribal governmental authority in closed areas or closed reservations. The Court seems to have adopted Justice Stevens' open-versus-closed approach to tribal territories. Where an area is open, the tribe is now divested of authority over non-Indian fee lands unless it can meet one of the *Montana* exceptions, and the Court has little sympathy with tribal claims of impacts on sovereign interests. But where an area is closed, the tribe retains full authority[345] to regulate throughout the closed area, regardless of land tenure.[346] That corner of territorial sovereignty is preserved to the tribes.

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342. *See generally supra* part IV. For that to occur, the Court still insists on a finding that Congress intended to sever the entire area that it then opened to non-Indian ownership.

343. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1988)).

344. *See supra* part II.B.

345. Whether inherent or treaty-protected or both. Justice Stevens' opinion in *Brendale* indicates that he believed both were the source of tribal sovereign authority in closed areas. 492 U.S. at 435.

346. As already noted, I am nervous about making that claim. Given the present Court's extreme hostility toward tribal territorial sovereignty, the fear is that the Court it will take that sovereign right away as well.

What is needed now is what the Court will not do: extend that recognition of tribal sovereign rights to the full extent of the Indian country.

VI. "SHALL WE PERSIST IN A POLICY THAT HAS FAILED?"

In 1885, at the dawn of the allotment era, former Commissioner of Indian Affairs George Manypenny wrote of his disillusionment with the allotment program.[347] As Commissioner, Manypenny had negotiated a number of treaties with western tribes to make way for the organization of the Kansas and Nebraska territories. For the most part, those treaties called for the Indian lands to be allotted in severalty, provisions which Manypenny believed at the time to be "wise and judicious."[348] By 1885, Manypenny's reaction to allotment was quite different:

> When I made those treaties I was confident that good results would follow. Had I not so believed I would not have been a party to the transactions. Events following the execution of these treaties proved that I had committed a grave error. I had provided for the abrogation of the reservations, the dissolution of the tribal relation, and for lands in severalty and citizenship; thus making the road clear for the rapacity of the white man. I had broken down every barrier. I had committed a grevious [sic] mistake, and entailed on the Indians a legacy of cruel wrong and injury. Had I known then, as I now know, what would result from those treaties, I would be compelled to admit that I had committed a high crime.[349]

Manypenny's wisdom was, unfortunately, lost on Congress. Within two years of Manypenny's article of contrition, Congress enacted the General Allotment Act, clearing the way for widespread application of the program that Manypenny decried. For nearly fifty years thereafter, tribes were subjected to the "cruel wrong and injury" of the allotment policy. Although allotment ceased in 1934 with official congressional repudiation of the policy and program, its legacy lingers on in the Supreme Court. With decisions in such diverse areas as taxation, reservation disestablishment, and regulation of fee lands, the Court continues to give effect to the purposes of a long-dead policy.

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347. George W. Manypenny, *Shall We Persist in a Policy That Has Failed?*, 11 COUNCIL FIRE 153 (Nov. 1885), *reprinted in* WASHBURN, *supra* note 30, at 61-67.

348. WASHBURN, *supra* note 30, at 66.

349. *Id.* at 67.

The political tenor of our times is no longer much amenable to arguments that the present effects of past policies must be corrected by the legal system. And yet that is the only approach that will work for the Indian tribes. Unless the Court is willing to act affirmatively to halt the devastating present effects of allotment,[350] or Congress is willing to step in, tribal territorial sovereignty is in danger of becoming a curio in the history of the Republic.

If the Court were willing to repudiate the policy of allotment, it has the tools to do so. In none of the cases critiqued in this article was the outcome foreclosed by treaty, by federal statute, or by precedent. Instead, in each of the cases, the Court had one or more avenues available to reach conclusions protective of tribal territorial sovereignty: the canons of construction, the repudiation of allotment in the Indian Reorganization Act, and the current federal Indian policy of tribal self-determination.

A careful application of the Indian law canons of construction would go far towards mitigating the persistent effects of the allotment policy. First, the General Allotment Act itself should be interpreted according to the canons. Either the Act should be viewed in its historical context as legislation enacted for the benefit of Indians[351] and therefore interpreted liberally in favor of the tribes, or the Act should be viewed in its post-1934 context as legislation abrogating Indian rights and therefore interpreted narrowly to limit those rights only where Congress was unmistakably clear. The results should be identical either way. The Act would not, for example, authorize state property taxes on fee-patented lands owned by Indians unless Congress said so, and Congress did not. Similarly, the Act would not strip tribes of sovereign rights over fee-patented lands sold to non-Indians unless Congress clearly mandated that result in the Act, and it did not. Finally, legislation implementing the Act would not divest reservations of homesteaded land unless Congress and the tribes had intended an outright cession of reservation lands, and few of the surplus lands acts evidence that plain intent.[352] Had the Court chosen to interpret the Dawes Act and its implementing legislation liberally in favor of the tribes and to resolve all ambiguities in favor of the tribes, the Court could have reached results consistent with both the statutes and the preservation of tribal territorial sovereignty. However naive it may

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350. The Court cannot undo allotment, but it can ameliorate its present effects. As Professor Singer has stated:

> Although it may in fact be too late to undo some past injustices, it is not too late to adjust the legal consequences of those past events where such adjustments are warranted. Adjustment may be appropriate where the failure to re-evaluate the significance of past events works to perpetuate a continuing injustice.

Singer, *supra* note 10, at 14.

351. In the 1887 view of things. *See supra* note 122.

352. *See supra* part IV.

be to expect the present Court to engage in conscientious application of the canons of construction, that interpretative approach is clearly available to the Court.

In addition to the canons, the Court could also employ an interpretation of the General Allotment Act and its implementing legislation that takes into account the repudiation of the allotment policy in the 1934 Indian Reorganization Act ("IRA").[353] In the IRA, Congress recognized the devastation wrought by allotment, halted further allotments and surplus lands acts, extended trust periods on existing trust allotments, authorized the addition of lands to reservations, and promoted the "reorganization" of tribal governments. Congress, in simple terms, terminated the allotment policy. Given the express terms of the IRA, the modern Court could choose to interpret the present effects of the allotment policy not in light of the intent of the 1887 Congress, but in light of the intent of the IRA.

If the purposes of the IRA become the context, then the important factors are the preservation of the land base and the perpetuation of tribal self-government. When the General Allotment Act, its implementing legislation, and its present effects are viewed against those purposes, the outcomes of the allotment-based cases should be radically different. State taxation of Indian-owned former allotments interferes with the tribe's ability to govern its members within its territory, and therefore obstructs the IRA purpose of promoting tribal government. The surplus lands acts are in direct opposition to the purposes of the IRA regarding the preservation, consolidation, and expansion of tribal territory, and therefore should be interpreted to diminish reservations only when they clearly implement an agreement ceding a tract outright to the federal government. Finally, divesting tribes of regulatory jurisdiction over nonmember fee lands contravenes both the IRA goal of tribal self-government and the principle of territorial integrity.

Time after time, however, the Court has flatly refused to consider the IRA and its purposes in deciding allotment-based cases. Justice Scalia has dismissed the importance of the IRA in this context, stating that "Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands."[354] While it is true that Congress did not, in the IRA, restore to tribal ownership lands then owned in fee by non-Indians, the purposes and intent of the IRA clearly support tribal territorial sovereignty. But the Court is using that one aspect of the IRA to find that it need not consider any other aspect of the Act—in particular, the intent of

353. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1988)).

354. County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 255 (1992).

the Congress that enacted it—in looking at the present effects of allotment-era legislation.

Moreover, the Court takes the same approach to a consideration of modern federal Indian policy. For 25 years, presidents have pledged to protect and promote tribal self-determination, and for the past decade that pledge has included a specific recognition of the "government-to-government" relationship between the federal government and the Indian tribes.[355] Congress has concurred, consistently enacting legislation over the past two decades that recognizes tribal self-government and control over tribal territory.[356] But as with the policies of the IRA, the modern policies of Congress and the Executive are apparently irrelevant in the Court's eyes. Nowhere in its allotment-derived cases does the Court recognize the "ongoing relationship"[357] between Congress and the tribes or the importance of that relationship. Indeed, the Court seems to have no compunction about interfering with that relationship by implementing the allotment policy rather than the current policy of tribal self-determination. If Congress is indeed the branch responsible for federal Indian policy, as the Court repeatedly states, then the Court should be supporting rather than undermining congressional attempts to ameliorate the effects of the allotment era.[358]

It is important to bear in mind that the Court's practice of ignoring current federal Indian policy, the intent of the IRA, and the canons of construction is in fact a *choice* by the Court. When it chooses, the Court has in the past proved willing to interpret assimilationist legislation in light of the canons of construction and subsequent contrary federal policy toward the tribes. The clearest illustration of the Court's choice *not* to effectuate the present effects of past assimilationist policy arises in cases decided as the termination era was drawing to a close.

The most prominent example is *Bryan v. Itasca County*, in which the Court refused to find that Public Law 280 had authorized state taxation of Indians within the Indian country.[359] Public Law 280 was the centerpiece legislation of the termination era, mandating state criminal and civil jurisdiction over Indians in some states and authorizing all other states

355. *See supra* text accompanying notes 97-103.

356. *See supra* part II.C.

357. Bryan v. Itasca County, 426 U.S. 373, 388 n.14 (1976).

358. As Professor Clinton has noted in the context of termination era legislation: "There is little reason why a democratic society should feel bound by a much older pronouncement from a Congress in session during a long ago abandoned federal policy, when recently Congress has fundamentally altered its approach in ways that clearly impact on, but do not directly repeal or alter, the earlier Congressional judgment." Clinton, *supra* note 156, at 43.

359. 426 U.S. 373 (1976).

unilaterally to assume that jurisdiction.[360] The civil jurisdiction section of Public Law 280 provided that state civil laws of general application would apply to Indians within the Indian country,[361] and on that basis Minnesota asserted the right to tax an Indian's personal property located on the reservation.[362]

The Supreme Court rejected the state's claim. It noted that because the purpose of Public Law 280 was primarily to ensure adequate law enforcement, any congressional intent to permit broad state civil authority in the Indian country was at best ambiguous.[363] Applying the canons of construction,[364] therefore, the Court found that Public Law 280 did not manifest clear congressional intent to permit state taxation of Indians.[365] Moreover, the Court noted that its reading of Public Law 280 was consistent with the later-enacted Indian Civil Rights Act[366] and with the shift in federal Indian

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360. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (1988)(criminal) and 28 U.S.C. § 1360 (1988) (civil)). As part of the Indian Civil Rights Act of 1968, Public Law 280 was amended to require tribal consent to state jurisdiction. *See* 25 U.S.C. § 1326 (1988). No tribe has since consented.

361. Pub. L. No. 83-280, § 4(a), 28 U.S.C. § 1360(a), provided that:

> Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. . . .

362. *Bryan*, 426 U.S. at 373.

363. The Court relied primarily on the lack of legislative history concerning the civil jurisdiction provision and on the fact that Congress knew, as the contemporaneous termination acts proved, how to authorize state jurisdiction when it intended to. *Id.* at 383-85.

The Court also rejected the finding of the Minnesota Supreme Court that § 4(a) authorized state taxation based on the "negative implication" of § 4(b). *Id.* at 378-79. Section 4(b) proscribed state taxation of any trust property. The state court had reasoned that there was no need for that language unless the grant of civil jurisdiction in § 4(a) generally authorized state taxation. The Supreme Court found that approach "foreclosed" by the legislative history of Public Law 280 and the canons of construction. *Id.* at 379. *But see* Frickey, *supra* note 15, at 430-31 (contending that neither the legislative history nor the canons of construction were the true basis of the Court's decision).

364. *Bryan*, 426 U.S. at 392-93.

365. Instead, the Court found that the civil section of Public Law 280 authorized only the jurisdiction of the state courts over civil causes of action arising in the Indian country. *Id.* at 385. The language about the application of state civil laws, the Court held, was intended to provide for the application of state court rules of decision. *Id.* at 383-84. Consequently, *Bryan* stands for the proposition that Public Law 280 did not authorize any state *regulatory* jurisdiction over Indians within the Indian country. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987).

366. *Bryan*, 426 U.S. at 386. The Court noted that the Indian Civil Rights Act had repealed part of Public Law 280 and instituted a requirement of tribal consent to state jurisdiction. Thus, even though the ICRA did not undo existing Public Law 280 jurisdiction, the Court was willing to take account of its general repeal of the *intent* of Public Law 280. In the allotment-derived cases, by contrast, the Court has not proved willing to take account of the Indian Reorganization Act's general repeal of the intent of the General Allotment Act. The Court, rather, continues to focus on a factor apparently irrelevant to the

policy away from assimilation and toward the preservation of tribal self-government.[367] The Court was thus willing, in order to protect tribal sovereign rights,[368] to construe assimilationist legislation in light of later congressional action[369] and subsequent policy changes.[370]

Other end-of-the-termination-era decisions reflect a similar concern to interpret assimilationist legislation so as not to saddle the tribes with the continuing effects of an outmoded policy. In *Menominee Tribe of Indians v. United States*, for example, the Court held that the Menominee Termination Act did not abrogate the Tribe's treaty rights to hunt and fish free of state control on the then-former Wolf River Reservation.[371] The Court insisted upon reading the Termination Act "*in pari materia* with" Public Law 280, which expressly preserved tribes' treaty rights to hunt and fish.[372] Because Public Law 280 was amended in a way that included the Menominee Tribe during the years that a termination plan was being developed[373] and,

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Court in *Bryan*: the fact that the later legislation did not entirely reverse the effects of the earlier assimilationist act.

367. *See Bryan*, 426 U.S. at 387.

368. Professor Frickey notes that in *Bryan*, as in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court "assumed a baseline of ongoing tribal sovereignty that should be judicially protected against all but clear congressional intrusion." Frickey, *supra* note 15, at 432.

369. The Court stated that:

> It is true, of course, that the primary interpretation of § 4 must have reference to the legislative history of the Congress that enacted it rather than to the history of Acts of a later Congress. Nevertheless, [the two acts are "intimately related"] . . . and we previously have construed the effect of legislation affecting reservation Indians in light of "intervening" legislative enactments.

Bryan, 426 U.S. at 386. The General Allotment Act and its repudiation by the IRA are certainly as "intimately related" as Public Law 280 and its partial repeal by the Indian Civil Rights Act. Under the reasoning of *Bryan*, there is no reason why the Court could not construe the Dawes Act in light of the intent and purposes of the IRA.

370. In a footnote, the Court quoted Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), with approval:

> Present federal policy appears to be returning to a focus upon strengthening tribal self-government, and the Court of Appeals for the Ninth Circuit has expressed the view that courts "are not obliged in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship."

Bryan, 426 U.S. at 388-89 n.14 (citations omitted). In its interpretation of the allotment-based cases, however, the Court is doing exactly what it condemned in *Bryan*: straining to implement a repudiated assimilationist policy even though that interferes with the present congressional approach.

371. 391 U.S. 404, 412-13 (1968).

372. *Id.* at 411.

373. *See id.* at 410-11. The Menominee Termination Act was enacted in 1954, but was not put into effect until 1961. Public Law 280 was originally enacted in 1953 and, at that time, exempted the Menominee from the grant of jurisdiction to the State of Wisconsin. Public Law 280 was amended, however, two months after the Termination Act to include "all Indian country" in Wisconsin. Because the Menominee Reservation had not yet been terminated, it was still "Indian country" and therefore covered by the amended grant.

therefore, the Menominee usufructuary rights were preserved after enactment of the Termination Act, the Court held that those treaty rights survived the termination of the Tribe from federal supervision.[374] If Congress intended its assimilationist legislation to deprive tribes of protected rights, it needed to make its intent clear. The Court "decline[d] to construe the Termination Act as a backhanded way of abrogating" those rights.[375]

Similarly, in the first of the reservation disestablishment cases in 1962, the Court refused to find a congressional intent to diminish in a surplus lands act that did not expressly terminate the lands from the reservation.[376] The Court contrasted the language opening the reservation to the language of other surplus land acts explicitly vacating Indian country and returning it to the public domain.[377] Moreover, the Court interpreted the surplus lands act in light of the subsequently enacted definition of Indian country. More than four decades after the surplus lands act at issue, Congress statutorily defined Indian country to include all lands within the exterior boundaries of a reservation, "notwithstanding the issuance of any patent . . . ."[378] In light of that later congressional enactment, the Court refused to find that the mere purchase of homesteads within reservations would diminish those fee lands from the tribal territorial boundaries.[379]

The contrast between the Court's approach in the post-termination era cases and in the post-allotment era cases is stark. In the former, the Court required clear evidence of congressional intent to abrogate tribal rights, construed statutes narrowly to limit or eliminate adverse effects on sovereignty, and interpreted congressional intent in light of subsequent congressional repudiation of the assimilationist policy that gave rise to the cases. In the post-allotment era cases, by contrast, the Court has chosen not to give effect to established canons of construction, to the congressional repudiation of

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374. *See id.* at 411.

375. *Id.* at 412. *Menominee Tribe* is primarily remarkable for the Court's clear vision that assimilationist statutes should be interpreted narrowly so as to preserve all tribal sovereign rights not expressly abrogated by Congress.

376. Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962) (discussed *supra* text accompanying notes 147-49). While *Seymour* was interpreting allotment-era legislation rather than termination-era legislation, it was decided when the destructive effects of the termination era were forcing Congress and the public to reconsider a policy of assimilation. Perhaps as a result, the Court's approach in *Seymour* is more consistent with its approach in cases such as *Bryan* and *Menominee Tribe* than with its subsequent approach in the allotment-based cases. *Compare Seymour*, 368 U.S. 351 *with Bryan*, 426 U.S. 388 *and Menominee Tribe*, 391 U.S. 404.

377. *Seymour*, 368 U.S. at 354-56.

378. *Id.* The surplus lands act at issue in *Seymour* was enacted in 1906. *See id.* at 354. The definition of Indian country, 18 U.S.C. § 1151(a), was enacted in 1948. *See Seymour*, 368 U.S. at 357 n.15.

379. 368 U.S. at 357-58.

assimilation, or to present federal Indian policy. Instead, the Court has chosen to further the discredited and destructive policies of the allotment era.

The Court's reasons for its choice do not survive scrutiny. In most of the allotment-based cases, the Court has ostensibly relied upon congressional intent: the intent of the Congress that produced the General Allotment Act. That begs the question, however, of why the Court is determined to follow that assimilationist intent when it could choose, instead, to use the approach that it followed in the termination-based cases. The Court's refusal to follow its own lead in *Bryan v. Itasca County*[380] and its insistence upon effectuating the allotment policy may thus be traced to a factor not present in the termination-era cases. And that factor is the impact of non-Indian expectations.[381]

In the allotment-based cases, the Court has consistently invoked the interests of non-Indian landowners in the Indian country.[382] Certainly, as

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380. 426 U.S. 388 (1976).

381. That factor does not fully explain the Court's adherence to the legacy of allotment. The Court's 1992 decision in *County of Yakima v. Yakima Indian Nation*, discussed *supra* in part III, for example, does not appear to implicate any reliance interests of non-Indian property owners within the Yakima Reservation to freedom from tribal authority.

382. The interests of non-Indians present in the Indian country for other purposes do not seem to invoke the same protectionist instincts. The Court has long held, for example, that tribes may control the conduct and activities of non-Indians who are present on Indian-owned lands within tribal territories. *See* Montana v. United States, 450 U.S. 544, 557 (1981) ("we can readily agree" with the lower court's holding that tribes may prohibit non-Indian conduct on trust lands). The exception, of course, was criminal jurisdiction. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (discussed *supra* at text accompanying notes 233-41.) Similarly, the Court has also long upheld the authority of tribes over non-Indians who enter the Indian country for the purpose of doing business with the tribes and their members. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (affirming the sovereign right of tribes to tax non-Indian lessees). The Court's primary concern in the allotment-based cases has been the interests of non-Indian landowners.

Perhaps for that reason, the Court has been remarkably protective of tribal sovereign interests in the area of civil adjudicatory jurisdiction. In 1959, the Court determined that state court jurisdiction over a civil cause of action arising in the Indian country against an Indian defendant would unduly infringe on the sovereign rights of the tribe. Williams v. Lee, 358 U.S. 217, 223 (1959). In the mid-1980s, the Court refused to extend the principle of *Oliphant* to tribal jurisdiction over non-Indian defendants in civil actions. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853-55 (1985). The Court noted in a subsequent case that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," and held, therefore, that tribes retain civil jurisdiction over those activities "unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987). Non-Indian defendants in civil lawsuits who wished to challenge tribal jurisdiction were directed first to the tribal court; only after exhausting their tribal remedies could defendants seek review in federal court. *National Farmers*, 471 U.S. at 856. If the federal court upholds tribal court jurisdiction, it is "preclude[d]" from relitigating the case on the merits. *See Iowa Mutual*, 480 U.S. at 19.

The Court thus expressly recognized the inherent sovereign right of tribes to adjudicate civil causes of action arising in their territories, even when the cause of action arose on non-Indian fee land. *See National Farmers*, 471 U.S. at 847 (the cause of action arose on school grounds on land owned by the state). Unlike criminal jurisdiction, civil adjudicatory jurisdiction was not implicitly divested because of

a result of the allotment years, non-Indians are present in force in many tribal territories. And as certainly, the non-Indians were invited into the Indian country by the federal government: explicitly in the surplus lands acts and by acquiescence, if nothing else, in the system of patenting allotments in fee. The Court has often invoked the theory that this non-Indian presence, originally under federal auspices, creates "justifiable expectations" which the Court must strive to protect.[383]

Whether non-Indians have any sort of vested right to be free of tribal jurisdiction is doubtful at best. No treaty promises were made to non-Indian settlers in the Indian country. At most, the federal government invited non-Indians into the Indian country with the understanding that eventually the Indians would assimilate and the tribes would disappear. That expectation may have created a form of psychological reliance, but it should have created no legal reliance interests. Moreover, in the Indian Reorganization Act, Congress determined to halt the allotment and surplus lands programs.[384] Congress no longer envisioned that the Indians would assimilate and the tribes would melt into the pot; instead, the Indian country would be preserved as intact as it was in 1934. Congress made that even more explicit in 1948 when it enacted the definition of Indian country as including all lands within the boundaries of a reservation, regardless of ownership.[385] In 1934, and again in 1948, and yet again with the modern federal policy of promoting

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the tribes' dependent sovereign status. No federal statute divests tribes of civil jurisdiction; to the contrary, federal law and federal policy promote the development of tribal courts. And few, if any, tribes will have treaty-based constraints on their judicial jurisdiction. The result is that tribes should have near exclusive jurisdiction over civil adjudication, and thus should also have the power to impose tribal law on the litigants. The substantive law developed and applied by the tribal courts will be tribal law. In holding that the federal courts may not relitigate the merits if tribal court jurisdiction is proper, the Court thus recognized and sanctioned the inherent right of tribes to apply their substantive civil law to non-Indian litigants.

The oddity, then, is that the Court recognizes the rights of tribes only as to certain types of civil authority. Under *National Farmers* and *Iowa Mutual*, tribes retain full inherent authority over non-Indians in such areas as torts, contracts, and domestic law. *See generally National Farmers*, 471 U.S. 845; *Iowa Mutual*, 480 U.S. 9. But under *Montana* and *Brendale*, tribes do not necessarily retain inherent authority over non-Indians on fee lands in such areas as zoning and regulation of hunting and fishing. *See generally* Montana v. United States, 450 U.S. 544; *Brendale*, 492 U.S. 408. Whether those two lines of cases can be reconciled is questionable: one line (arising from *National Farmers*) involves tribal adjudicatory jurisdiction, and the other (arising from *Montana*) involves tribal regulatory jurisdiction, but that fact hardly constitutes an explanation of the difference. One possible reason is a perception by the Court that the adjudicatory cases do not implicate the interests of non-Indians *as property owners* within the Indian country, while the regulatory cases clearly do. Whatever potential that explanation has, however, the fact remains that the Court appears far more concerned with non-Indian interests when those interests derive directly from the fee ownership of land within the Indian country.

383. *See, e.g.*, Hagen v. Utah, 114 S. Ct. 958, 970 (1994).

384. *See supra* text accompanying notes 83-90.

385. *See* 18 U.S.C. § 1151(a).

tribal government, Congress changed the rules for non-Indians resident in the Indian country. If that constituted any sort of taking of any vested interests of non-Indian property owners, their remedy is against the federal government, not the tribes.

But if the federal government made no promises to non-Indian settlers that could have ripened into vested rights, the government most assuredly did make those promises to the tribes. In treaty after treaty, the federal government guaranteed the tribes the right to "absolute and undisturbed use and occupation," a promise that encompassed the right of the tribes to govern their territory.[386] Those treaties were abrogated by the General Allotment Act and its implementing legislation; the government broke its "solemn promise" to every tribe subject to allotment and homesteading.

The federal government thus has not kept its word to anyone. It broke its treaty guarantees to the tribes when it invited white settlers into the Indian country, and it broke its implicit contract with the settlers when it reversed the assimilationist policy and sought to preserve tribal lands and tribal government. Much of the argument against tribal territorial sovereignty seems to rest on the idea that the government should now keep its "promise" to the settlers, but not its promise to the tribes. The logic of that escapes me. If the Court considers non-Indian expectations more important, more worthy of protection, more "justifiable" than tribal rights, then the Court is obligated to account for its reasons.

One of the principal arguments for non-Indian freedom from tribal authority is that non-Indians are not and cannot become citizens of the tribes.[387] They have no vote in tribal matters and no role in determining tribal law and tribal policy.[388] The Court has therefore posited that it is "improbable" that Congress intended tribal authority over non-Indians to continue once tribal lands passed into non-Indian ownership.[389]

The argument that non-Indians have not consented to tribal jurisdiction is countered by the fact that no other government is subject to a requirement that non-citizens consent to the exercise of authority over them.[390] If a citizen of one state owns property in another state, for example, the property is subject to the authority of the state in which it is located. If a citizen of one state engages in conduct or activities within a second state, the state of

386. *See, e.g.*, the 1868 Treaty of Fort Laramie, discussed *supra* text accompanying notes 247-48.

387. *See* Dussias, *supra* note 273, at 86.

388. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 688 (1990); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 161 (1980).

389. *Brendale*, 492 U.S. at 437 (Stevens, J., concurring).

390. This argument has recently been fully developed by Professor Dussias. Dussias, *supra* note 273, at 87-91. *See also* Clinton, *supra* note 5, at 151-52.

locus has jurisdiction over the actor. In neither case is the host state's jurisdiction limited by the fact that the non-citizen has no say in the host state's government. Instead, the individual is held to consent to jurisdiction by the fact of owning property or engaging in activity within the host state. Nothing further is required of states, and absent congressional mandate, nothing further should be required of tribes.

An additional concern is that the tribes will not deal fairly with non-Indians and their property. That concern may stem from a sense of historical guilt. If the majority society has seldom dealt fairly with the tribes, it may expect that tribes, given the opportunity, will return the favor. Alternatively, the concern may arise from simple colonial mistrust of the natives' ability to get it right. To the extent that distrust of tribal authority over non-Indians is rooted in ethnocentrism, the country simply ought to get over it. Fairness concerns may be alleviated by the protections of the Indian Civil Rights Act,[391] coupled with a willingness to trust tribal lawmaking institutions.

The protection of non-Indian expectations over tribal sovereign rights may serve as the colonialist defense of the Court's legacy of allotment, but that defense is ultimately specious. Federal promises to the tribes are no less sacred than federal promises made to non-Indian purchasers of property in the Indian country. In light of congressional repudiation of allotment and the modern federal policy of protecting and promoting tribal self-government, no justification exists for the Court to elevate the interests of non-Indian property owners above the inherent and treaty-guaranteed sovereignty of the tribes.[392]

Thus, if the Court were willing, it could recognize and affirm the territorial sovereignty of the tribes without doing violence to non-Indian rights. But the Court has chosen instead to further the legacy of allotment. And with the Court generally unwilling to mitigate, much less unravel, that legacy, protecting tribes today from the ravages of past policies will fall to Congress.

In the past few years, Congress has been cautiously willing to countermand Supreme Court decisions affecting tribal sovereignty that Congress views as wrongly decided. The most dramatic of these congressional "fixes"

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391. In particular, the ICRA guarantees rights of due process and equal protection. 25 U.S.C. § 1302. Tribal court decisions reported in the INDIAN LAW REPORTER reveal judiciaries intent upon resolving disputes fairly and evenhandedly.

392. Professor Clinton has identified one exception. A tribe should not be able to exercise its sovereign power to exclude from the Indian country a non-Indian who owns land in fee within the tribal territory. Clinton, *supra* note 5, at 153. Nonetheless, Clinton argues that "decolonizing" federal Indian law depends upon "the return to a more territorial conception of tribal sovereignty divorced from the overlay of racial and ethnic status of the parties and land ownership that has plagued Indian jurisdictional cases for the past quarter century." *Id.* at 152.

is the legislative reversal of *Duro v. Reina*.[393] In *Duro*, the Court extended its ruling from *Oliphant*[394] that Indian tribes were implicitly divested of criminal jurisdiction over non-Indians. The Court ruled in *Duro* that tribes were also divested of criminal jurisdiction over Indians who were not members of the prosecuting tribe. Within months of the decision, Congress reversed it.[395] Congress amended the Indian Civil Rights Act definition of the powers of tribal self-government to provide that those powers include "the inherent power of an Indian tribe, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[396] The *Duro* legislation shows in no uncertain terms that Congress can act swiftly and decisively to bring the Court to heel when the Court has deprived the tribes of legitimate sovereign powers.[397]

More recently, Congress has again indicated its willingness to reverse the Court on issues of tribal sovereignty. In the 1989 case of *Cotton Petroleum Corporation v. New Mexico*, the Court upheld concurrent state taxation of non-Indian mineral lessees on trust lands.[398] The House Committee on Interior and Insular Affairs questioned the Court's reasoning and contended that the decision was "potentially contrary to the fundamental principles of tribal sovereignty and the Congressional policy to create economic development on reservations."[399] As a result, in the Indian Energy Resources Act of 1992, Congress established the Indian Energy Resource Commission and charged it, among other duties, with developing recommendations on dual tribal-state taxation of mineral lessees.[400] If the Commission gives due weight to tribal sovereignty and federal Indian policy, it should recommend that concurrent state taxation of mineral lessees be abolished. The legislative

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393. 495 U.S. 676 (1990) (discussed *supra* note 238).

394. *Oliphant*, 435 U.S. at 191. The *Oliphant* decision is discussed *supra* text accompanying notes 233-41.

395. *See generally* Newton, *supra* note 238; Skibine, *supra* note 238.

396. 25 U.S.C. § 1301(2).

397. A practical law enforcement reason existed for the *Duro* legislation as well. Under the Court's decision, no government—tribal, state, or federal—would have had jurisdiction to prosecute non-member Indians for minor crimes committed in the Indian country. 495 U.S. at 696-97. The Court brushed that problem aside with the suggestion that "the proper body to address the problem is Congress." *Id.* at 698. Congress did in fact address the problem, and did so in a way that expressly recognized tribal sovereignty. 25 U.S.C. § 1301(2). But cynicism might suggest that Congress might not have done so but for the gap in law enforcement.

398. 490 U.S. 163, 163 (1989). For criticism of the case, see Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 575-79 (1994).

399. H.R. REP. NO. 474, 102d Cong., 2d Sess., pt.8, at 95-96 (1992).

400. 25 U.S.C. § 3505(k)(1). For a discussion of the Act and the Commission, see Royster, *supra* note 398, at 596-601.

history of the Indian Energy Resources Act clearly indicates that Congress would be willing to enact such a recommendation into law.[401]

Similar congressional fixes have been proposed for some of the Court's recent allotment-based decisions. Commentators have suggested, for example, that Congress fix *County of Yakima v. Yakima Indian Nation* by expressly exempting fee-patented former allotments from state property taxes.[402] Although that approach would surely benefit tribes by removing what may be a significant financial burden from their members, this type of piecemeal approach to the legacy of allotment is ultimately unsatisfactory. What is needed is the courage to take on allotment as a whole and to finally effectuate its 1934 repudiation.[403] If the Supreme Court were willing, it could do that. But it is not, and so Congress must now act to restore tribal territorial integrity and halt further depredations.

The difficulty is that Congress does not appear any more willing than the Court to comprehensively address the lingering issue of allotment. Some of the worst of the reservation disestablishment cases are now two decades old, but no congressional legislation has ever been enacted to deal with the diminishment issue. The *Montana* decision has been around for over a decade, and even *Brendale* is now a few years old; but again, Congress has shown no inclination to fix the problem of limiting tribal sovereignty to Indian-owned lands.[404] It may be that the cumulative weight of the recent

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401. *See* H.R. REP. NO. 474.

402. Karns, *supra* note 106, at 1240-41 (proposing statutory language); Borrero, *supra* note 106, at 956.

403. Other commentators have concurred. *See, e.g.*, McClanahan, *supra* note 317, at 527 (calling, after *Bourland*, for federal legislation "to restrain the Court's judicial activism in the area of tribal sovereignty").

404. Congress has failed to step in despite some difficulty in reconciling *Brendale* with Congress's treatment of tribes under the federal environmental laws. In open areas, *Brendale* posits a scheme of tribal authority dependent upon land ownership. 492 U.S. 408 (1989). The environmental laws, by contrast, often are based on tribal territorial authority throughout the Indian country, *see, e.g.*, Clean Air Act, 42 U.S.C. § 7401 (Supp. 1992); Clean Water Act, 33 U.S.C. § 1377(e)(2) (1988), and even where they arguably are not, generally require unitary management in order for the environmental protection schemes to be effective. *See generally* Judith V. Royster and Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989). For differing views of how *Brendale* and the environmental laws should be reconciled, compare Royster, *supra* note 268 (arguing that the environmental laws offer a way around the zoning control lost under *Brendale*) with Peter W. Sly, *EPA and Indian Reservations: Justice Stevens' Factual Approach*, 20 ENVT'L L. REP. (ENVT'L L. INST.) 10429 (1990) (arguing that *Brendale*'s open-versus-closed approach to tribal authority should be applied to tribal jurisdiction under the environmental laws). The Environmental Protection Agency (EPA) compromised: it did not reject the approach in *Brendale* outright, but did determine that, in virtually all instances, tribes will exercise environmental authority under the federal statutes throughout their territories. The EPA's approach is explained at 56 Fed. Reg. 64,876 (1991).

cases[405] will prompt Congress to act, but past congressional inaction is not encouraging. Congress seems clearly more comfortable with discrete and confined legislative fixes to particular Court decisions than it does with large-scale policy determinations.

In short, I am not optimistic.[406] The optimum solution to the legacy of allotment would be for the Court to recognize tribal territorial sovereignty. The Court should apply the canons of construction and interpret allotment-era-based issues in light of the Indian Reorganization Act and current federal Indian policy. But as we used to say in the small towns, that and a dime will get you a cup of coffee. The next best solution would be a universal fix from Congress, reaffirming that Congress meant what it said in the Indian Reorganization Act of 1934: allotment is over and its effects on the tribes should be relegated to history. But I strongly suspect that that and another dime will get you a refill.

VII. CONCLUSION

The title of this article is appropriated from the title of historian Patricia Limerick's book, The Legacy of Conquest.[407] Professor Limerick posits

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405. The Court has issued an opinion furthering the legacy of allotment in each of the last three terms: County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992), South Dakota v. Bourland, 113 S. Ct. 2309 (1993), and Hagen v. Utah, 114 S. Ct. 958 (1994).

406. I am not entirely pessimistic either. Following the Court's decision in *Montana*, discussed *supra* text accompanying notes 242-64, the lower courts engaged in considerable damage control by holding that a range of activities resulted in sufficient impacts on tribal interests that tribes retained inherent sovereign authority to regulate. *See* cases cited *supra* note 266. Also, in the reservation disestablishment area, lower courts have often been scrupulous in protecting tribal rights. *See, e.g.*, Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986), discussed *supra* note 217. Also, some courts have already refused to extend the Court's decision in *County of Yakima* wholesale to all alienable lands. *See* Southern Ute Indian Tribe v. Board of County Comm'rs, 855 F. Supp. 1194 (D. Colo. 1994); Pease v. Yellowstone County, 21 Indian L. Rep. 6109 (Crow Ct. App. 1994), discussed *supra* text accompanying notes 137-40. Similarly, Congress has on occasion responded promptly and effectively to Supreme Court derogations of tribal sovereignty. *See, e.g.*, the legislative fix of *Duro v. Reina*, discussed *supra* text accompanying notes 393-97.

My lack of optimism stems, rather, from the intractable nature of the Supreme Court's approach. In every recent case that implicates the allotment program, the Court has inexorably carried forward the legacy of the allotment years. Despite the fact that the Court's approach is contrary to modern federal Indian policy, Congress has shown no inclination to muzzle the Court's attempt to reformulate the nation's relationship with the Indian tribes. The lower federal courts and the tribal courts may once again engage in damage control: they may read Supreme Court cases narrowly, confine the worst of the depredations to the facts of the cases, and protect tribal sovereign interests wherever possible. My wish is that this would not be necessary. My lack of optimism arises from the fact that it is.

407. PATRICIA N. LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST (1987).

that the conquest of the American West, far from ending with the "closing of the frontier" in 1890,[408] remains a vital part of the modern West. Viewing conquest only as history, she argues, blinds us to the very real legacy of conquest in the West today:

> The conquest of Western America shapes the present as dramatically—and sometimes as perilously—as the old mines shape the mountainsides. To live with that legacy, contemporary Americans ought to be well informed and well warned about the connections between past and present. But here the peculiar status of Western American history has posed an obstacle to understanding. Americans are left to stumble over—and sometimes into—those connections, caught off guard by the continued vitality of issues widely believed to be dead.[409]

Limerick's insight is as vital for the legacy of allotment in American Indian law as it is for the legacy of conquest in American Western history. Allotment, widely believed to be dead, remains instead an obstacle to the sovereignty of the Indian tribes. The policy's continued vitality in the Court may no longer catch us off guard, we may now be well informed and well warned, but the damage that the legacy does continues.

The policy of allotment is thus to modern Indian law what the idea of conquest is to the modern American psyche: a concept whose time has gone, but a concept that will not go away. Like conquest, allotment is outmoded, a doctrine unsuited to modern life and modern sensibilities. But like conquest in the collective psyche, allotment in Indian law seems buried too deeply, imbedded too permanently to simply disappear of its own accord. Only a clear recognition of its continuing presence and a deliberate choice to renounce its present effects will rid Indian law and Indian tribes of a policy that was officially repudiated sixty years ago.

In order to move Indian law into the twenty-first century, then, the legacy of allotment must be excised from the canon of Indian law. The Court, intent upon effectuating the legacy, will not do so. Congress may putter around the edges, but thus far has shown neither the foresight nor the gumption to end it. And that leaves Indian tribes in an increasingly precarious position. At the turn of the last century, tribes were facing the allotment policy itself. At the turn of the next century, tribes are still facing allotment: no longer as a formal government policy, but rather as a lingering

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408. The "closing" of the American frontier and the consequent end to the "first period" of American history was the thesis developed by Frederick Jackson Turner in his 1893 essay, *The Significance of the Frontier in American History*. Turner's thesis is discussed in LIMERICK, *supra* note 407, at 20-22.

409. LIMERICK, *supra* note 407, at 18.

legacy eroding their sovereign rights. The twenty-first century demands that the baggage of the nineteenth finally be discarded.